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In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. A, *infra*, 1a-44a) is not yet officially reported. The decision and order of the National Labor Relations Board (App. C, *infra*, 47a-66a) are reported at 226 N.L.R.B. 754.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 45a-46a) was entered on June 29, 1979. On September 14, 1979, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including October 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral retailer, directed at the product of a firm with which the union is in dispute, is forbidden by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the retailer's customers to cease dealing with it altogether.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

STATEMENT

1. Respondent, the certified bargaining representative of certain employees of Safeco Title Insurance Company, called a strike following an impasse in negotiations for an initial contract (App. C, *infra*, 50a). In addition to picketing Safeco's office, striking employees also engaged in picketing and handbilling outside the offices of five land title companies, ninety percent of whose business was selling Safeco insurance policies (App. C, *infra*, 51a).[1]

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[1] All of the insurance policies issued by the five companies —Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County— are underwritten by Safeco. The remaining 5 to 10 percent of the land title companies' income comes from title research and escrow services. Safeco owns part of the stock of each of the land title companies, and a Safeco officer serves on the board of directors of each company. However, Safeco has no control over the personnel policies of any of the land title companies. Each land title company is autonomous in establishing its employees' wages, hours, and other terms and conditions of employment. All of the employees of each land title company perform their work in the local area of their respective company, and there is no interchange of employees between Safeco and the land title companies. (App. C, *infra*, 51a-52a; J.A. 18-23.)

The signs carried by the strikers stated (App. C, *infra*, 51a; J.A. 19-24):[2]

> SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES LOCAL 1001.

The strikers also distributed handbills to the general public requesting policyholders to support the strike by cancelling their insurance policies with Safeco (App. C, *infra*, 51a). The Union's activities at the land title companies did not cause any work stoppages or interfere with deliveries (App. C, *infra*, 51a; J.A. 19-24).

2. The Board concluded that the land title companies were neutrals in the dispute between Safeco and the Union, rather than "allies" of Safeco (App. C, *infra*, 54a-58a). The Board then considered the applicability of *NLRB* v. *Fruit and Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*"Tree Fruits"*), where this Court ruled that Section 8(b)(4)(ii)(B) permits a union to engage in consumer picketing at the site of a secondary employer "directed only at the struck product," but outlaws "a union appeal to the public at the secondary site not to trade at all with the secondary employer" (377 U.S. at 63). Relying on its decision in *Local 14055, United Steelworkers of America, AFL-CIO*, 211 N.L.R.B. 649 (1974) (*"Dow Chemical"*), which involved a similar situation, the Board concluded that, although the Union's secondary-site picketing was limited to Safeco's products, it violated Section 8(b)(4)(ii)(B) because it was "reasonably calculated to induce customers not to patronize the neutral parties at all" (App. C, *infra*, 58a-59a). Since almost the entire business of the companies was devoted to the sale of Safeco insurance policies, the picketing, if successful, "would predictably involve a virtually complete boycott of the land title companies. * * * The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business" (App. C, *infra*, 59a). The Board ordered the Union to cease its unlawful conduct (App. C, *infra*, 61a).[3]

3. The court of appeals, sitting en banc and dividing 5 to 4, denied enforcement of the Board's order.[4] The court upheld the Board's finding that the land title companies were neutrals in the Union's dispute with Safeco.

Following its earlier decision in *Dow Chemical*,[5]

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[2] "J.A." references are to the printed appendix filed in the court of appeals. A copy has been lodged with the Court.

[3] Two members of the Board dissented on the ground that the picketing was lawful since it was directed only at the struck product and because, in any event, the land title companies were not "neutral employers" (App. C, *infra*, 63a-65a).

[4] The decision of a divided panel of the court, 99 L.R.R.M. 3330 (1978), which had upheld the Board's decision, was vacated when the case was set down for en banc consideration.

[5] *Local 14055, United Steelworkers of America* v. *NLRB*, 524 F.2d 853 (D.C. Cir. 1975), denying enforcement of 211 N.L.R.B. 649 (1974), judgment vacated and remanded for reconsideration in light of intervening circumstances, 429 U.S. 807 (1976), complaint dismissed because of mootness, 229 N.L.R.B. 302 (1977).

however, the court held that because the picketing was limited to the struck product the foreseeable economic consequences to the neutrals were not a sufficient basis for finding that the picketing "threaten[ed], coerce[d], or restrain[ed]" the neutrals within the meaning of Section 8(b)(4)(ii)(B) of the Act. (App. A, *infra*, 26a-32a.)

The dissenting judges agreed with the Board that *Tree Fruits* does not protect picketing of a neutral retailer where the intended or foreseeable effect of the picketing is to persuade the retailer's customers to cease dealing with it altogether (App. A, *infra*, 35a-44a).

REASONS FOR GRANTING THE PETITION

The issue presented—whether picketing of a neutral retailer, which, if successful, would result in a total consumer boycott of the picketed establishment, is privileged under this Court's decision in *Tree Fruits* so long as the picketer's appeal is directed to the struck product—is the same issue on which the Court granted certiorari in *Dow Chemical*, 429 U.S. 807 (1976).[6] The position of the court of appeals conflicts with that of the Sixth Circuit in *American Bread Company* v. *NLRB*, 411 F.2d 147 (1969), and the issue is a recurrent one in the administration of the Act. Nothing has occurred since the grant

[6] As noted *supra*, page 5, note 5, the Court, after granting certiorari in *Dow Chemical*, remanded the case for reconsideration in the light of intervening circumstances, and the Board subsequently dismissed the complaint because of mootness.

of certiorari in *Dow Chemical* to diminish the need for final resolution of the issue. Review by this Court is therefore clearly warranted.

1. The union in *Tree Fruits* picketed neutral Safeway stores to persuade Safeway's customers to boycott apples in support of the union's primary dispute with apple packers and distributors (377 U.S. at 59-61). Rejecting the Board's ruling that all such secondary picketing was illegal *per se* (132 N.L.R.B. 1172), and the court of appeals' view that only secondary picketing that would in fact cause the neutral substantial economic injury was prohibited (308 F.2d 311 (D.C. Cir. 1962)), this Court determined (377 U.S. at 63) that in enacting Section 8(b)(4)(ii)(B) Congress had meant to outlaw peaceful consumer picketing at secondary sites whenever it was employed "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." This sort of prohibited activity, said the Court (377 U.S. at 70), was "poles apart from [peaceful consumer] picketing which only persuades [the neutral's] customers not to buy the struck product" and thus confines the union's appeal to the public to its dispute with the primary employer.

The facts of *Tree Fruits* were amenable to incisive distinction between picketing limited to the struck goods and picketing aimed at the secondary's patronage generally. Apples occupy but a small portion of Safeway's retail shelves, and the union could urge Safeway's customers to refrain from buying them

without asking that they cease trading with Safeway altogether. But *Tree Fruits* did not hold, as the court below implies, that struck product picketing can never transgress Section 8(b)(4)(ii)(B).[7] The critical inquiry under *Tree Fruits* is whether, considering all the circumstances, the union's conduct amounts to the "isolated evil" Congress feared—picketing used "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). Picketing having such an object is unlawful, whether or not it also happens to be limited in terms to the struck products.

Separating the permissible from the prohibited in some cases will doubtless call for a careful weighing

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[7] The court below reasoned that (App. A, *infra*, 25a-26a):

> When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary and secondary employers is simply a reflection of the consuming public's reaction to the union's limited appeal, geographically extended as it was from the primary to the secondary site. But when the picketing is utilized to induce customers to foresake the secondary employer completely he "stops buying the struck product," . . . "not because of a falling demand, but in response to pressure designed to inflict injury on his business generally" [quoting from *Tree Fruits, supra*, 377 U.S. at 71].

This rationale fails to recognize that there are circumstances, such as those here, where the picketing, though confined to the struck product, would nonetheless have the prohibited effect of "induc[ing] customers to foresake the secondary employer completely."

by the Board of disputed factual contentions. By contrast, the approach of the court below would simplify that inquiry by focusing it solely on the language of the picket signs, but in doing so would fail to achieve Congress' will as elucidated in *Tree Fruits*. In struck product cases it is the Board's duty, subject to judicial review, to determine whether the union's conduct in effect amounts to an appeal to consumers "not to trade at all with the secondary employer," thereby generating "pressure designed to inflict injury on his business generally" and creating "a separate dispute" with him, in violation of Section 8(b)(4)(ii)(B) (377 U.S. at 72). See *NLRB* v. *Twin Cities Carpenters District Council*, 422 F. 2d 309, 314 (8th Cir. 1970); *Hoffman* v. *Cement Masons Union Local 337*, 468 F. 2d 1187, 1192 (9th Cir. 1972), cert. denied, 411 U.S. 982 (1973).

The court of appeals' *per se* approach to Section 8(b)(4)(ii)(B) would require in this case the very result Congress meant to avoid. The Union's picketing, while strictly speaking limited to the struck product, Safeco insurance policies, in practical and predictable effect was aimed at cutting off substantially all of the business of the neutral secondaries. As the dissenting judges below pointed out (App. A, *infra*, 40a): "Here the land title companies sell only insurance underwritten by Safeco and derive 90-95 percent of their income from such sales. Their other income comes from services ancillary to the issuance of title insurance policies. Thus their business is co-extensive with the product." On these facts, the

Board properly concluded (App. C, *infra*, 58a-59a) that the Union's picketing was "reasonably calculated to induce customers not to patronize the neutral parties at all." [8]

2. The decision below conflicts with *American Bread Co.* v. *NLRB*, 411 F. 2d 147 (6th Cir. 1969). There the struck product was bread and the secondary employers were neutral drive-in restaurants and other eating places. The court looked "not to the supposed form, but to the reality of the picketing" (*id.* at 154) and upheld the Board's determination that the union's picketing violated the Act. In *Tree Fruits*, the court noted, "the consumers could continue their normal shopping and still sympathize with the Union by refraining from the purchase of Washington State apples," whereas, in the case before it, to display their union support "consumers would have to stop ordering sandwiches, baked goods and all meals served or made with bread." The court therefore held that the union's product picketing was unlawful "since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer" (*ibid.*).

We disagree with the court below that *American Bread* can be meaningfully distinguished from the instant case on the ground that there the struck

[8] The Union must, of course, be deemed to have intended this result. See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 45 (1954).

goods were "merged" into the retailers' other products and lost their "separate identity" (App. A, *infra*, 30a, n. 93). That merger of the goods into the retailers' other products is what made the case similar to this one, where for all practical purposes there are no other products sold by the retailer. The Board's holding here thus follows *a fortiori* from that in *American Bread*. Indeed, the Sixth Circuit there stressed the probable result of the union's activity—"a boycott on all the meals served in the establishments" (411 F. 2d at 154)—rather than the threshold inability of potential customers to order bread-free meals. There can be little reason why the protection afforded by Section 8(b)(4)(ii)(B) to neutrals should differ from one case to another when both the union conduct and its foreseeable impact on the neutral are the same.[9]

3. The issue of the lawfulness of single product picketing likely to result in a total or near total boy-

[9] The court in *American Bread* relied to some extent on *Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952 (D.C. Cir. 1968), which held that the union violated Section 8(b)(4)(ii)(B) when it picketed retail establishments that advertised their products in the pages of a newspaper with which the union was in dispute. Although the court in *Honolulu Typographical* disclaimed any intention of passing on the "single product" issue involved here—which it characterized as "the hard problem posed by the *Tree Fruits* dissenters" (401 F.2d at 956)—its rationale—that "where picketing means a total boycott" Congress has preferred to protect the neutral's desire to avoid a boycott of his entire business over the union's desire to maximize pressure on the primary employer (*ibid.*)—is inconsistent with the decision below.

cott of the neutral's business is important to the administration of the National Labor Relations Act. The issue has reached the courts of appeals in several cases, and it recurs frequently before the Board. This Court recognized the need to resolve the issue in granting certiorari in *Dow Chemical*, and the same considerations warrant granting review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

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OCTOBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2015

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

SAFECO TITLE INSURANCE CO., INTERVENOR

ON REHEARING EN BANC

Argued En Banc February 7, 1979

Judgment Filed June 29, 1979

Opinions Filed August 10, 1979

Before WRIGHT, *Chief Judge*, and BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON, in which *Chief Judge* WRIGHT and *Circuit Judges* BAZELON, MCGOWAN and LEVENTHAL concur.

Dissenting Opinion filed by *Circuit Judge* ROBB, in which *Circuit Judges* TAMM, MACKINNON and WILKEY concur.

ROBINSON, *Circuit Judge*: The principal question before us is whether Section 8(b)(4)(ii)(B) of the National Labor Relations Act [1] interdicts peaceful consumer picketing of neutral retail establishments,[2] designed only to dissuade purchasing of a product supplied by the picketers' employer, when sales of the struck product comprise the great bulk of the neutral retailers' business.[3] We answer the question in the negative.

I. FACTUAL AND PROCEDURAL BACKGROUND

Safeco Title Insurance Company, a California corporation, engages in title insurance underwriting and related activities in the State of Washington. In 1974, Local 1001 of the Retail Store Employees Union, Retail Clerks International Association, AFL-CIO, became the certified collective-bargaining representative of certain Safeco employees. Contract negotiations ensued but several months later reached an impasse, whereupon the employees went on strike

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[1] 29 U.S.C. § 158(b)(4)(ii)(B) (1976), quoted in relevant part *infra* note 31.

[2] See Part II *infra*.

[3] We normally will refer to the supplier with whom the union was in dispute as the primary employer, the picketed retailers of the item supplied by the primary employer as the secondary employers, and the item traded between the two as the struck product.

and began picketing Safeco's office in Seattle. On various occasions thereafter striking employees, with the knowledge and authority of the union, patrolled the premises of one or more of five land title companies having close business ties with Safeco.[4] In each instance, the employees carried signs reading

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001,

and distributed handbills to passersby beseeching Safeco policyholders to support the strike by cancelling their insurance. The picketing did not, however, result in any work stoppage at the land title companies or interfere with any deliveries to them.

The land title companies conduct real estate title searches, issue title insurance policies and perform escrow services. Safeco underwrites all of their policies,[5] from which their revenues are overwhelmingly

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[4] These companies—all Washington corporations—are Land Title Company of Clark County, Land Title Company of Cowlitz County, Land Title Company of Kipsap County, Land Title Company of Pierce County and Land Title Company of Snohomish County.

[5] This follows from agency contracts between Safeco and the land title companies individually. Each policy bears Safeco's Seattle address and the signature of Safeco's president, and is countersigned by a land title company employee designated as an authorized officer of Safeco. Safeco's written consent is a prerequisite to commitments of coverage exceeding a limit fixed for each company. The land title companies cannot issue title insurance policies in their own names.

derived.[6] Safeco is a substantial stockholder in each of the companies,[7] of which a Safeco officer is invariably a director [8] and usually an officer. Nevertheless, Safeco exercises no control over their personnel policies regarding wages, hours, terms or conditions of employment, nor does Safeco interchange employees with them. None of the employees of the land title companies is represented by a labor organization and, from aught that appears, none performed struck work.

The affair became a matter of Board concern when one of the companies [9] filed a complaint characterizing the picketing of its premises as an unlawful secondary boycott and thus an unfair labor practice. Safeco followed shortly thereafter with similar charges of its own. The Board dealt with the litigation directly [10] and, two principal issues evolving from its analysis, it ruled by a bare majority

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[6] The range is from 90% to 95%.

[7] Safeco's stock ownership is 53% in one of the land title companies and it ranges from 12% to 38% in the other four.

[8] Two directors in one instance and one director in each of the others are Safeco officials. The companies' boards of directors range from six to nine in size.

[9] Land Title Company of Pierce County.

[10] The parties stipulated the salient facts, waived intermediate proceedings before an administrative law judge and submitted the case directly to the Board for decision. The Board approved this course and transferred the litigation to itself.

against the union on each.[11] The Board found that the land title companies were neutrals in the dispute between the union and Safeco and accordingly were entitled to claim the protection of Section 8(b)(4)(ii)(B) of the Act.[12] The Board then held that the picketing in question fell within that section's prohibition on secondary boycotts and ordered the union to desist therefrom.[13] The union has petitioned us

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[11] *Retail Store Employees Union Local 1001*, 226 N.L.R.B. 754 (1976). The vote was three to two, with Members Fanning and Jenkins dissenting. The union was charged also with a violation of § 8(b)(4)(i)(B), 29 U.S.C. § 158(b)(4)(i)(B) (1976). Since, however, there was no indication that the union had sought to induce any employee to engage in a work stoppage, the Board saw no occasion to assess the union's conduct in light of that section. *Id.* at 757 n.16.

[12] *Id.* at 756.

[13] *Id.* at 757. Safeco argued to the Board, and insists here, that the sign utilized by the picketers contained a false statement and insufficiently identified the struck product. In its view that the picketing was in any event an illegal secondary boycott, the Board deemed it unnecessary to pass on Safeco's contention, *Retail Store Employees Local 1001*, *supra* note 11, 226 N.L.R.B. at 757 n.16, and resultantly neither can we. An administrative order must stand or fall on the rationale put forward by the agency, *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270, 80 S.Ct. 1122, 1126-1127, 4 L.Ed.2d 1208, 1213 (1960); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1955, 1999 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626, 633 (1943), and we are not at liberty to supply "an alternative, unstated ground to support an agency's decision if that ground is one that 'the agency alone is authorized to make.'" *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 764, 93 S.Ct. 1870, 1880, 36 L.Ed.2d 635, 647 (1973), quoting *SEC* v. *Chenery Corp.*, *supra*, 318 U.S. at 88, 63 S.Ct. at 459, 87

to review and set aside the Board's order, and the Board has applied for enforcement. We perceive no occasion to disturb the Board's first conclusion,[14] but we are unable to agree with the Board on the second.[15]

II. Neutrality of the Land Title Companies

As stated by its legislative sponsor, Section 8(b)(4)(ii)(B) "makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." [16] And as this court has heretofore cautioned, "[t]he proscription of the sweeping terms of the provision was thus construed to be 'limited to protecting employers in the position of neutrals between contending parties.'" [17] It follows that the picketing at issue may be condemned by that provision only if the land title companies were neutrals *vis-a-vis* the controversy between Safeco and the union.[18] The Board found that they were, and the union attacks this finding. We think the Board must be sustained on this branch of the litigation.

L.Ed. at 633. Our disapprobation of the order under review is without prejudice to such consideration as the Board may be inclined to give the pretermitted questions.

[14] Discussed in Part II *infra*.

[15] Discussed in Part III *infra*.

[16] 93 Cong. Rec. 4198, II Legislative History of Labor-Management Relations Act, 1106 (1947) (remarks of Senator Taft). See also *National Woodwork Mfgrs. Ass'n* v. *NLRB*, 386 U.S. 612, 620-633, 87 S.Ct. 1250, 1255-1262, 18 L.Ed.2d 357, 364-371 (1967) (discussion of legislative history).

[17] *Carpet Layers Local 419* v. *NLRB*, 139 U.S.App.D.C. 68, 71, 429 F.2d 747, 750 (1970), quoting *National Woodwork Mfgrs. Ass'n* v. *NLRB*, *supra* note 16, 386 U.S. at 625, 87 S.Ct. at 1258, 18 L.Ed.2d at 367. See also *NLRB* v. *Steel Fabricators Local 810*, 460 F.2d 1, 5 (2d Cir.), *cert. denied*, 409 U.S. 1041, 93 S.Ct. 527, 34 L.Ed.2d 491 (1972).

The Board embarked upon its task by recognizing at the outset that "[t]he question of neutrality can be resolved only by considering in each case the factual relationship between the alleged secondary employer and the primary employer in light of the congressional intent to protect employers who are unconcerned and not involved in the labor dispute of the union and the primary employer." [19] The circumstances to be considered, the Board enumerated, "are the degree of common ownership; the common control of day-to-day operations, including labor relations; the extent of integration of business operations; and the dependence of one employer on the other for a substantial portion of its business." [20] "None of these factors," the Board said, "alone is sufficient; rather the Board weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other." [21]

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[18] See cases cited *supra* notes 16-17 and *infra* notes 26, 28-30. See also note 27 *infra*.

[19] *Retail Store Employees Union Local 1001*, *supra* note 11, 226 N.L.R.B. at 756 (footnote omitted).

[20] *Id.* (footnote omitted).

[21] *Id.* (footnote omitted).

Adhering to these guidelines, the Board elaborated its conclusion

> that the land title companies are neutral and separate employers with respect to Safeco's dispute with [the union]. Safeco is a minority stockholder in all cases with the exception of Land Title Co. of Clark County, and thus has no potential for exercising control over any but the latter company. The parties stipulated, and we find, that there is no interchange of employees between the land title companies and Safeco and that Safeco has no control over the labor policies of any of the land title companies. And, although the parties stipulated that one member of the board of directors of each of the land title companies (two in the case of Land Title Co. of Clark County) is an officer of Safeco, the record indicates that Safeco is not involved in any way in their day-to-day operations. Safeco is, as [the union] urges, a party to each title insurance policy issued by a land title company. However, the type and degree of collaboration between the principal or underwriter and agent required for the issuance of insurance policies is not such as to warrant a finding that the two are engaged in an integrated business operation. There is no contention that employees of the land title companies were performing struck work. Accordingly the only factor in the instant case which would plausibly negative the claim that the land title companies are neutral employers is their economic dependency on Safeco, since each land title company derives between 90 and 95 percent of its total income from the issuance of Safeco

> policies. However, in *Dow Chemical Company*,[22] . . . the Board majority held that economic interdependency alone was not sufficient basis upon which to predicate loss of neutral status. Therefore, we find that the land title companies are secondary employers entitled to the protection of [the secondary boycott provision].[23]

Assessments on the factually varying and frequently complex status of neutrality are primarily the function of the Board,[24] whose judgment must be accepted judicially unless contrary to law or unsupported by substantial evidence on the record viewed as a whole.[25] The union does not claim that the factual underpinning for the Board's outcome is insufficient, nor plausibly could it do so; it argues instead that the close business relationship and economic interdependence of Safeco and the land title companies compelled a different result. We are satisfied, however, that mere unity of interests is not

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[22] 211 N.L.R.B. 649 (1974), *enforcement denied on other grounds, sub nom. Local 14055, United Steelworkers* v. *NLRB (Dow Chem.)*, 173 U.S.App.D.C. 229, 524 F.2d 853 (1975), *vacated and remanded, sub nom. Dow Chem. Co.* v. *Local 14055, United Steelworkers*, 429 U.S. 807, 97 S.Ct. 42, 50 L.Ed.2d 68 (1976), *complaint dismissed on remand, sub nom. Dow Chem. Co.*, 229 N.L.R.B. 302 (1977).

[23] *Retail Store Employees Union Local 1001, supra* note 11, 226 N.L.R.B. at 756 (footnote omitted).

[24] *Carpet Layers Local 419* v. *NLRB*, 151 U.S.App.D.C. 338, 347-348, 467 F.2d 392, 401-402 (1972), and cases there cited.

[25] *Id.* at 348, 467 F.2d at 402, and cases there cited. See also *United Tel. Workers* v. *NLRB*, 187 U.S.App.D.C. 231, 234, 571 F.2d 665, 668, *cert. denied*, —— U.S. ——, 99 S.Ct. 101, 58 L.Ed.2d 121 (1978).

enough, nor even is some unity of ownership; there "must be in addition such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies," [26] and surely nothing of that magnitude emerged here. Whatever power Safeco might wield from its stock ownership in the land title companies, there is no suggestion that Safeco is actually involved in their ordinary business operations. Moreover, the parties stipulated and the Board found that there is no interchange of employees, and that the companies are wholly free to formulate and pursue their own labor policies.[27] And while indubitably the relationship between Safeco and the land title companies exudes strong economic interdependence, we have flatly rejected the notion that standing alone that circumstance suffices to dissolve the protection of Section 8(b)(4)(ii)(B).[28]

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[26] *American Fed'n of Television Artists* v. *NLRB*, 149 U.S.App.D.C. 272, 277, 462 F.2d 887, 892 (1972), *quoting Drivers, Chauffeurs & Helpers Local 639*, 158 N.L.R.B. 1281, 1286 (1966). See also *Local 391, Int'l Bhd. of Teamsters* v. *NLRB*, 178 U.S.App.D.C. 60, 63, 543 F.2d 1373, 1376 (1976), *cert. denied*, 430 U.S. 967, 97 S.Ct. 1649, 52 L.Ed.2d 359 (1977).

[27] The only activity over which Safeco exerts any sort of supervision is the issuance of title insurance commitments above specified dollar limits, and this is no more than a prudent and commonplace control over its liability as an underwriter.

[28] *Carpet Layers Local 419* v. *NLRB, supra* note 24, 151 U.S.App.D.C. at 346-347, 467 F.2d at 400-401. Accord, *NLRB* v. *International Bhd. of Electrical Workers*, 542 F.2d 860, 865-866 (2d Cir. 1976). *Cf. United Tel. Workers* v. *NLRB, supra* note 25, 187 U.S.App.D.C. at 233, 571 F.2d at 667.

In sum, the Board combed the record for evidence indicative of an alliance between Safeco and the land title companies generating a commonality in labor relations. It isolated all of the facts we can deem material [29] and evaluated them by criteria with which we find no fault.[30] Its quest disclosed no more than the functional integration of a title insurance underwriter and its policy-writing agencies, and the economic dependence of those agencies. That, we hold, is too little to vitiate the Board's conclusion on neutrality.

III. Legality of the Picketing

A. *The Board's Decision*

We thus face foursquare the question whether the union's picketing of the land title companies' premises was an unlawful secondary boycott. Section 8(b)(4)(ii)(B) declares it to "be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain" a secondary employer "where . . . an object thereof is . . . forcing or requiring [him] to cease using, selling, handling, transporting, or otherwise dealing in the products

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[29] See *Local 24 Int'l Bhd. of Teamsters* v. *NLRB*, 105 U.S. App.D.C. 271, 276, 266 F.2d 675, 680 (1959) (Board erred in failing to consider all material facts).

[30] See *NLRB* v. *Steel Fabricators Local 810, supra* note 17, 460 F.2d at 5-6.

of" the primary employer.[31] In ruling that the union ran afoul of this injunction, the Board read the Supreme Court's interpretive decision in *NLRB* v. *Fruit*

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[31] National Labor Relations Act, § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1976), providing in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in industry affecting commerce, where in either case an object thereof is—
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize, or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary picketing. . . .

Section 158(b)(4) is subject to the further proviso that

> nothing contained in [paragraph 4] shall be construed to prohibit publicity, *other than picketing*, for the purpose of truthfully advising the public . . ., that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

(Emphasis supplied).

& Vegetable Packers Local 700 (Tree Fruits) [32] as varying the operation of the statutory provision in two separate situations. One is where secondary consumer picketing is restricted to an endeavor to persuade customers not to purchase the struck product, activity that *Tree Fruits* concededly put beyond the pale of illegality.[33] The other is where the picketing is designed to induce customers not to trade with the secondary party at all.[34] The Board obviously relegated to the second category situations of the kind now before us—picketing directed exclusively at the struck product, but in circumstances where that product accounts for all or nearly all of the secondary employer's business. The Board had made precisely that classification earlier in its *Dow Chemical* decision;[35] "[t]he predictability," it now said, "that a successful effort in this regard would result in forcing the secondary employer to go out of business or to abandon the primary employer led the Board to conclude in *Dow Chemical* that the picketing had an unlawful object." [36] Choosing to travel

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[32] 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964), *rev'g*, 113 U.S.App.D.C. 356, 308 F.2d 311 (1962), *rev'g*, 132 N.L.R.B. 1172 (1961). Unless other indicated, our references to *Tree Fruits* are to the Supreme Court's decision therein.

[33] *Retail Store Employees Union Local 1001*, *supra* note 11, 226 N.L.R.B. at 757.

[34] *Id.*

[35] *Supra* note 22.

[36] *Retail Store Employees Union Local 1001*, *supra* note 11, 226 N.L.R.B. at 757.

that path again in the case at bar, the Board reasoned:

> [T]he facts of the present case indicate that a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the land title companies. Between 90 and 95 percent of the title companies' gross revenues is derived from the issuance of Safeco policies. The remainder is derived from sources which are largely ancillary to the issuance of title insurance policies, e.g., title research and escrow services. [The union's] activities therefore had the predictable result of dragging the land title companies into its dispute with the primary employer, Safeco. The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful. We find, therefore, that [the union's] consumer appeal constitutes coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.[37]

Tree Fruits and *Dow Chemical* thus bear heavily upon the construction properly to be given the statutory embargo on secondary boycotts in its relation to the episodes upon which we must pass. We deem it profitable to pause at this point to consider the litigative histories of those cases for such contribution as they may make to solution of the problem at hand.

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[37] *Id.* (footnote omitted).

B. *Tree Fruits*

Tree Fruits involved picketing at a group of neutral retail stores of the Safeway chain against Washington State apples, one of many items sold in the stores. The picketing was an attempt to support a union's strike against packers and warehousemen supplying those apples. When *Tree Fruits* was before the Board, it construed Section 8(b)(4)(ii)(B) as preclusive of any and all consumer picketing at the establishment of a neutral.[38] The Board felt, as it did here, that the natural and foreseeable result of such picketing is to force the secondary employer to curtail or cease trading with the primary employer, and that any union engaging in that activity effectively intends to bring about the statutorily forbidden result.[39]

On review of that holding, this court, unconvinced that Congress meant to foreclose all secondary consumer picketing as presumptively coercive, reversed the Board's decision.[40] We interpreted the statute as requiring a case-by-case balancing of two incongruent policies: protection of the secondary employer from economic harm, and protection of the union in advocacy of its position to consumers.[41] We held that

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[38] *Tree Fruits, supra* note 32, 132 N.L.R.B. 1172, 1177.

[39] *Id.* at 1177-1178.

[40] *Tree Fruits, supra* note 32, 113 U.S.App.D.C. 356, 308 F.2d 311.

[41] *Id.* at 362-363, 308 F.2d at 317-318.

the factor tipping the scale would be whether the secondary employer suffered or was likely to incur substantial economic injury.[42] Only when such injury was imminent could the Act be invoked to outlaw peaceful picketing, we thought, without infringing First Amendment rights.[43]

The Supreme Court, however, rejected both the Board's inferred-intent theory [44] and our economic-impact test.[45] Adhering to its policy of "not ascrib-[ing] to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' . . . that Congress intended to do so as regards the particular ends of the picketing under review," [46] and expressing "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment," [47] the Court was led by an examination of pertinent legislative history [48] to

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[42] *Id.*

[43] *Id.*

[44] *Tree Fruits, supra* note 32, 377 U.S. 58, 62-72, 84 S.Ct. 1063, 1066-1071, 12 L.Ed.2d 129, 133-139.

[45] *Id.* at 73, 84 S.Ct. at 1071, 12 L.Ed.2d at 139.

[46] *Id.* at 63, 84 S.Ct. at 1066, 12 L.Ed.2d at 133, quoting *NLRB* v. *Local 639, Int'l Bhd. of Teamsters,* 362 U.S. 274, 284, 80 S.Ct. 706, 712, 4 L.Ed.2d 710, 718 (1960).

[47] *Tree Fruits, supra* note 32, 377 U.S. at 63, 84 S.Ct. at 1066, 12 L.Ed.2d at 133.

[48] That is, the history of amendments to § 8(b)(4), 29 U.S.C. § 158(b)(4) (1976), effected by the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), § 704(a), 73 Stat. 542, 29 U.S.C. § 158(b)(4) (1976).

> conclude that [§ 8(b)(4)(ii)(B)] does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" [49] believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct, and peaceful picketing at the secondary site directed only at the struck product.[50]

The Court then explained that difference:

> In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the

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[49] The quoted words are from *NLRB* v. *Local 639, Int'l Bhd. of Teamsters, supra* note 46, 362 U.S. at 284, 80 S.Ct. at 712, 4 L.Ed.2d at 718 ("[i]n the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing").

[50] *Tree Fruits, supra* note 32, 377 U.S. at 63, 84 S.Ct. at 1066, 12 L.Ed.2d at 133-134.

> goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.[51]

So, addressing "the question whether the picketing [there in issue], confined as it was to persuading customers to cease buying the product of the primary employer, falls within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit under § 8(b)(4)(ii)," the Court held "that it did not fall within that area, and therefore did not 'threaten, coerce, or restrain' Safeway." [52] The Court delineated its decisional rationale:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[53]

[51] *Id.* at 63-64, 84 S.Ct. at 1066-1067, 12 L.Ed.2d at 134 (footnote omitted).

[52] *Id.* at 71, 84 S.Ct. at 1071, 12 L.Ed.2d at 138.

[53] *Id.* at 72, 84 S.Ct. at 1071, 12 L.Ed.2d at 138-139 (footnote omitted).

C. *Dow Chemical*

The specific question here—whether secondary consumer picketing limited to the struck product passes muster when that product accounts predominantly or entirely for the secondary employer's revenues—came initially before the Board in *Dow Chemical.*[54] A union on strike against a Dow refinery picketed six neutral service stations in a campaign to dissuade customers from buying "Bay" gasoline, the refinery's product, sales of which produced from 81 to 98 percent of the gross income of five of the six stations. A majority of the Board held the picketing illegal.[55] Acknowledging that under *Tree Fruits*, Section 8(b)(4)(ii)(B) "does not proscribe peaceful consumer picketing which is employed only to persuade customers not to buy the struck product, as opposed to picketing to persuade consumers to cease all trading with the secondary retailer," [56] the Board interpreted *Tree Fruits* as holding "that the minimal impact the picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was

[54] *Supra* note 22.

[55] 211 N.L.R.B. 649 (1974). Members Fanning and Jenkins, the dissenters in the instant litigation, dissented there also.

[56] *Id.* at 651.

to persuade the retailer to discontinue handling the struck product to cut its losses. It was on that basis, in our opinion, that it held that the picketing in that case did not 'threaten, coerce, or restrain' the retailer within the meaning of Section 8(b)(4)." [57] As to the six service stations, however, it was the Board's view that

> the picketing was reasonably calculated to induce customers not to patronize the neutral parties, in this case the gas station operators, at all. Even though some of the stations involved sell tires and provide repair service, which special aspects of their business might be relatively unimpaired, most of their business is gasoline sales and minor items incidental thereto. Some, at least, would predictably be forced out of business if the picketing were successful, and all would predictably be squeezed to a position of duress, escapable only by abandoning Dow in favor of a new source of supply. It is not only the potential impact of the picketing, however, that distinguishes this case from *Tree Fruits*. It is, more importantly, the predictability of such impact that leads us to conclude that the picketing had an unlawful object.[58]

The Board's *Dow Chemical* ruling was reviewed and unanimously overturned by a panel of this court.[59] The union's victory in *Dow Chemical* was

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[57] *Id.*

[58] *Id.* at 651-652.

[59] *Dow Chem., supra* note 22, 173 U.S.App.D.C. 299, 524 F.2d 853 (1975).

short-lived, however. The Supreme Court granted certiorari, vacated the panel's judgment and remanded the case "for reconsideration in light of intervening circumstances." [60] On remand, the Board dismissed the complaint after determining that the intervening event—dissolution of the union local subsequent to the panel's decision—had rendered the controversy moot.[61] In the litigation at bar, the Board adhered to the views it had expressed in its *Dow Chemical* opinion in lieu of those of the *Dow Chemical* panel,[62] and once again we are summoned to consider the validity of the grounds advanced by the Board.

D. *The Present Case*

We approach the problem confronting us with full appreciation of its perplexity. Section 8(b)(4)(ii)(B) is ambiguous on the point at issue; and the Supreme Court's *Tree Fruits* interpretation of the statutory language, of course, was not an undertaking to deal with every question that conceivably could arise. We would be less than frank if we failed to acknowledge that a good many passages in *Tree*

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[60] *Dow Chem., supra* note 22, 429 U.S. 807, 97 S.Ct. 42, 50 L.Ed.2d 68 (1976).

[61] *Dow Chem., supra* note 22, 229 N.L.R.B. 302 (1977).

[62] *Retail Store Employees Union Local 1001, supra* note 11, 226 N.L.R.B. at 757 & n.15. We need not ponder whether vacatur of the panel's judgment in *Dow Chemical* robbed the accompanying opinion of the precedential force it otherwise would have commanded. Whatever its status as precedent, it cannot be gainsaid that the value of its reasoning endures.

Fruits can be read in isolation to lend support to either side of the present controversy. Our decision, then, is only what it can be: our very best judgment, guided maximally by *Tree Fruits* considered as a whole, as to what Congress had in mind.

The Board resolved the issue of the legality of the union's picketing by describing it as "reasonably calculated to induce customers not to patronize the neutral parties at all" [63] rather than as "consumer picketing which is employed only to persuade customers not to buy the struck product." [64] Thus characterized, the Board's conclusion, that the union's conduct had an unlawful object, followed automatically.[65] We are unable to accept this summary approach. To begin with, it focuses upon the Supreme Court's *Tree Fruits* language differentiating proscribed secondary picketing from protected consumer picketing [66] without reference to the remainder of the Court's opinion. Thus stripped of its moorings, classification according to the *Tree Fruits* dichotomy appears arbitrary in the situation before us. The challenged picketing, as the Board accepted it,[67] was carefully limited to a boycott of the struck product; but, by reason of its vast predominance in the secondary retailers' public offerings, a broad boycott of their businesses became

[63] *Id.* at 757.

[64] *Id.*

[65] *Id.*

[66] See text *supra* at note 50.

[67] See note 13 *supra.*

a distinct probability. We think, then, that *Tree Fruits* must be probed much more deeply for the criterion distinguishing the permissible from the forbidden. We believe that when the union's activities are examined in light of the *Tree Fruits* opinion in its entirety, they are protected under the Court's interpretation of the Act.

As the Court emphasized in *Tree Fruits*, the "isolated evil" prompting the congressional ban on peaceful consumer picketing at secondary locations "was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." [68] Section 8(b)(4)(ii)(B), so far as relevant here, proscribes peaceful secondary picketing only when it "threaten[s], coerce[s], or restrain[s]" the *secondary employer* with the object of "forcing or requiring" him "to cease selling, handling, . . . or otherwise dealing in the products of" the primary employer or "to cease doing business with" the latter.[69] Throughout its opinion in *Tree Fruits*, the Court made it very plain that union activity, even when calculated to thwart sales by the secondary employer of the primary employer's product, is not unlawful unless it "threaten[s], coerce[s], or restrain[s]" the secondary employer within the contemplation of that section.[70] The crucial question

[68] See text *supra* at note 50.

[69] See note 31 *supra.*

[70] As we noted in *Honolulu Typographical Union 37* v. *NLRB*, 131 U.S.App.D.C. 1, 4 n.7, 401 F.2d 952, 955 n.7 (1968), "[t]he Court apparently did not question that the

in this case, then, is whether that occurred when the union's picketers solicited help from the public in an endeavor to halt transactions in Safeco title insurance.

In *Tree Fruits*, the Court rejected the Board's basic premise "that Congress determined that [secondary consumer] picketing always threatens, coerces or restrains the secondary employer." [71] It also rejected this court's view "that the test of 'to threaten, coerce, or restrain' for the purposes of [that case was] whether Safeway suffered or was likely to suffer economic loss." [72] Instead, the Court took a very different approach in order to determine whether picketing "threaten[s], coerce[s], or restrain[s]"; the critical inquiry the Court undertook, simply and solely, was whether the "picketing is employed only to persuade customers not to buy the struck product." [73] That was because, in that event, "the union's appeal is closely confined to the primary dispute," [74] and while the picketing is extended to the secondary employer's premises, if the union's effort is successful the secondary employer's purchases from the primary employer "are decreased only because the public

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object of the picketing was to force Safeway to cease dealing in struck Washington apples by making it unprofitable to do so."

[71] *Tree Fruits, supra* note 32, 377 U.S. at 62, 84 S.Ct. at 1066, 12 L.Ed.2d at 133.

[72] *Id.* at 72, 84 S.Ct. at 1071, 12 L.Ed.2d at 139.

[73] See text *supra* at note 53.

[74] See text *supra* at note 53.

has diminished its purchases of the struck product." [75] As we ourselves have put it, essentially the union's activity was analogized to "primary picketing at a secondary situs," [76] and "[i]nsofar as Safeway was pressured by the picketing that pressure was limited to the portion of Safeway's business that would have been disrupted in any event by a successful primary strike." [77] So, since the union's public appeal merely tracked the flow of the struck apples into Safeway retail outlets, and asked merely that consumers refrain from buying those apples, it was not "within the area of secondary consumer picketing which Congress did clearly indicate its intention to prohibit . . . and therefore did not 'threaten, coerce; or restrain' Safeway." [78]

In this rationale we can perceive clearly enough the line of demarcation between what Section 8(b)(4)(ii)(B) leaves unaffected and what it plainly forbids—the line distinguishing "between picketing a secondary employer merely to 'follow the struck goods,' and picketing designed to result in a generalized loss of patronage . . . ." [79] When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary

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[75] See text *supra* at note 53.

[76] *Honolulu Typographical Union 37* v. *NLRB, supra* note 70, 131 U.S.App.D.C. at 4, 401 F.2d at 955.

[77] *Id.* (footnotes omitted).

[78] See text *supra* at note 52.

[79] *Tree Fruits, supra* note 32, 377 U.S. at 64 n.7, 84 S.Ct. at 1067 n.7, 12 L.Ed.2d at 134 n.7.

and secondary employers is simply a reflection of the consuming public's reaction to the union's limited appeal, geographically extended as it was from the primary to the secondary site. But when the picketing is utilized to induce customers to foresake the secondary employer completely he "stops buying the struck product," the *Tree Fruits* Court reminds, "not because of a falling demand, but in response to pressure designed to inflict injury on his business generally." [80] As *Tree Fruits* declares, "[p]eaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." [81] In, the latter case, unlike the former, the union "does more than merely follow the struck product; it creates a separate dispute with the secondary employer." [82]

The test of "threaten[ing], coerc[ing], or restrain-[ing]" which we thus distill from *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor, or whether the picketing projects its force beyond these boundaries. So measured, the activity in the instant case does not contravene the stricture of Section 8(b)(4)(ii)(B). The union had struck and picketed Safeco, the purveyor of title insurance to the public through the land title companies. The union expanded the area of the picketing to include the premises of these companies, and that, for purposes of its decision, the Board took as activity tailored to persuading consumers to boycott Safeco insurance.[83] While most of the companies offered little else—title searches and escrow services—there is no suggestion that the picketing was structured to affect anything but the struck insurance.[84] The union seemingly was bent

[80] See text *supra* at note 53.

[81] *Tree Fruits, supra* note 32, 377 U.S. at 70, 84 S.Ct. at 1070, 12 L.Ed.2d at 137-138.

[82] See text *supra* at note 53.

[83] See note 13 *supra*. We are mindful that the leaflets distributed by the picketers asked the public to cancel outstanding policies of any type issued by four named insurance companies comprising the Safeco Group. However, the proviso to § 8(b)(4)(ii)(B), quoted *supra* note 31, "authorize[s] publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him," though "not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work," nor "picketing which persuades the customers of a secondary employer to stop all trading with him [is] also . . . barred." *Tree Fruits, supra* note 32, 377 U.S. at 70-71, 84 S.Ct. at 1070, 12 L.Ed.2d at 138.

[84] Safeco attempts to distinguish the present case from *Tree Fruits* on the theory that Safeco title insurance was integrated into the overall service offered by the land title companies, Brief for Intervenor at 11-14; Supplemental Brief for Intervenor at 7-13, and thus that the "merged-product" doctrine is applicable. See note 93 *infra*. It suffices to point out that the Board, while noting that Safeco had advanced that argument, discarded it instead and predicated its decision exclusively on the fact that Safeco title insurance predominated the companies' sales. *Retail Store Employees Union Local 1001, supra* note 11, 226 N.L.R.B. at 757; Part I *supra*. "[W]e cannot 'accept appellate counsel's *post hoc* rationalizations for agency action'; for an agency's order

on drastically curtailing the market for that product, but that was all.[85] We are thus constrained to hold that the picketing did not "threaten, coerce, or restrain" the land title companies within the meaning of Section 8(b)(4)(ii)(B).

The Board rested its contrary conclusion solely on the proposition "that a successful boycott of Safeco insurance policies would predictably involve a virtual complete boycott of the land title companies." [86] That, by the Board's estimate, was enough to transform

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must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326, 41 L.Ed.2d 141, 156 (1974), quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 246, 9 L.Ed.2d 207, 216 (1962). See also note 13 *supra*.

[85] Our brethren in dissent say that the legislative history of the 1959 amendments is devoid of any intimation that a secondary retailer was to be exposed to consumer picketing against the struck product when that product is his only item of merchandise. Dissenting Opinion (Dis. Op.) at 3-4. This observation is beside the point. The appropriate inquiry on congressional intent is not for some mere hint one way or the other but instead for "the clearest indication" of a purpose to outlaw the involved mode of peaceful picketing. See text *supra* at note 52. As the dissenters note, Senator McClellan, in support of his anti-boycott bill, described the plight of the merchant who has built his business around a single product. But the Senator's statement, examined in its entirety, indicates that he was concerned with picketing aimed at disrupting the merchant's business generally, not with a narrowly focused consumer boycott of the struck product. 105 Cong. Rec. 6667 (1959). For a similar understanding of the Senator's remarks, see *Tree Fruits*, *supra* note 32, 377 U.S. at 65-66, 84 S.Ct. at 1067-1068, 12 L.Ed.2d at 135.

[86] See text *supra* at note 37.

the picketing into "coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act." [87] Our colleagues in dissent contend similarly that the financial consequences posed for the companies were alone sufficient to trigger the statutory picketing.[88] We think these positions are totally at war with *Tree Fruits*.

The Court's test for coercion, as we have delineated, essentially is whether secondary consumer picketing strikes a blow only at the primary employer's ultimate market for the struck product, and not otherwise at the secondary employer's business. Neither the potential nor the predictable economic consequences for the secondary entrepreneur is the key, nor even a factor in the equation. The *Tree Fruits* Court's reasoning would seem to make that conclusion evident, and other considerations serve to drive it firmly home. In no wise was the *Tree Friuts* decision pitched on the degree of financial impact,[89]

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[87] See text *supra* at note 37.

[88] Dis. Op. *passim*.

[89] As the Board members dissenting in this litigation observed, there is nothing in *Tree Fruits* "which indicates that consumer picketing, otherwise lawful, becomes unlawful when it may have the inconsequential or ineffective level and have a significant impact on the secondary's business in which he sells the struck product." *Retail Store Employees Union Local 1001*, *supra* note 11, 226 N.L.R.B. at 758. See also the discussion in *Dow Chem.*, *supra* note 22, 173 U.S.App.D.C. at 303-304, 305-306, 524 F.2d at 857-858, 859-860. And see *Local 150, Int'l Bhd. of Teamsters*, 151 N.L.R.B. 734, 740 (1965) ("[i]f the picketing is lawful, the possible economic consequences are immaterial").

though the dissenting members of the Court called attention to the milieu we face today.[90] It bears repeating that the *Tree Fruits* majority disagreed with the earlier view of this court "that the test of 'to threaten, coerce or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss." [91] We find it difficult to imagine a more explicit rejection of the economic-impact theory of prohibited coercion.[92]

In urging that the foreseeable economic consequences of the union's effort converted an appeal directed solely to the struck product into a prohibited call for a full boycott of the secondary employers' business, the Board and the dissent alike embrace the concept of coercion that *Tree Fruits* consigned to the graveyard.[93] More than that, they stand the

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[90] See note 103 *infra*.

[91] *Tree Fruits, supra* note 32, 377 U.S. at 72, 84 S.Ct. at 1071, 12 L.Ed.2d at 139.

[92] The dissent argues that, having accepted the Board's finding that the land title companies were neutral despite their heavy trafficking in Safeco title insurance, we render that finding largely nugatory when we sanction peaceful picketing to dissuade public purchase of that insurance. Dis. Op. at 6 n.3. We cannot agree. Lack of neutrality would per se have validated the picketing, see Part II *supra*, but the picketing cannot be made unlawful by the fact of neutrality alone. We thus can perceive no inconsistency in these two holdings.

[93] The dissent claims support from *Honolulu Typographical Union 37* v. *NLRB*, *supra* note 70, wherein we sustained a Board holding that § 8(b) (4) (ii) (B) barred picketing urging patrons of restaurants to forego consumption of products

advertised in a struck newspaper. Dis. Op. at 4-7. We wonder just how much assistance *Honolulu Typographical* could be expected to provide here since the court there was careful to warn that it "need not decide" nor did it even "intimate a view on . . . the hard problem posed" for decision today. *Id.* at 5 n.9, 401 F.2d at 956 n.9.

Honolulu Typographical and other merged-product cases seem readily distinguishable. There is a decisionally-significant difference between a secondary employer's sales of a struck product in the form in which it leaves the primary employer, and sales by the secondary employer of goods or services into which the struck product has been so integrated as to lose its separate identity for all practical purposes. In the former situation, the primary employer and the secondary retailer cater to the same body of eventual consumers; the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory. When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the primary employer and the secondary retailer no longer deal in the same product and share a common market. The struck product no longer has a market of its own, and it cannot be pursued into the market for the merged product without implicating its other components. The stark fact of the matter is that a discrete consumer boycott of the struck product, given its newly-acquired character, is simply not possible. See *id.* at 4, 401 F.2d at 955.

The decided cases vividly illustrate the contrast. In *Honolulu Typographical*, restaurant customers acceding to the union's supplication would have had to boycott meals—products, of course, not supplied by the primary employer, the newspaper. Similarly, in *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969), in order to boycott a struck product —bread—customers of picketed restaurants would have had to pass up meals that included bread, thus effectively spreading the boycott to products not encompassed by the dispute with the primary employer. In the case at bar, however, consumers were neither required nor requested to boycott any

decisional rationale of *Tree Fruits* on its head. As this court, advertently to *Tree Fruits*, aptly noted in *Dow Chemical*,

> the [Supreme] Court did not say that the picketing in *Tree Friuts* did not threaten, coerce or restrain Safeway and therefore did not fall within the area Congress intended to prohibit by section 8(b)(4). The Court said that since the picketing was not conduct of the kind which Congress intended to prohibit by that provision, it followed that it did not threaten, coerce or restrain the secondary within the meaning Congress attached to the provision. It was not one of the "isolated evils" [94] intended to be prohibited by section 8(b)(4). The Court viewed Congress as having determined that the possible loss to a secondary caused by this means of publicizing a labor dispute with the producer of the struck products, when weighed against a policy favoring the right peacefully to publicize the dispute, did not outweigh the right.[95]

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neutral product in order to honor the picketers' appeal. Neutral secondary employers are legally susceptible to consumer picketing under *Tree Fruits*, but only insofar as the boycott of the struck product does not spill over into other phrases of the secondary enterprise. In true merged-product cases, however, the notion that the struck product is being followed to the consumer becomes so tenuous as to lose touch with reality. *Honolulu Typographical Union 37* v. *NLRB*, *supra* note 70, 131 U.S.App.D.C. at 4, 401 F.2d at 955.

[94] See note 49 *supra* and accompanying text.

[95] *Dow Chem.*, *supra* note 22, 173 U.S.App.D.C. at 304-305, 524 F.2d at 858-859 (footnote omitted).

We are mindful of "the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation," [96] and of the respect normally to be accorded a defensible construction conferred thereon by the Board.[97] But "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress," [98] and it goes without saying that we cannot accept a Board interpretation at odds with the Supreme Court's definitive analysis of the governing statute. As we read *Tree Fruits*, Congress has itself weighed the policies competing for dominance in the situation at hand, and has cast its lot in favor of picketing designed only to reduce the secondary employer's market for products of the primary employer. Our charge as judges is to remain faithful to that understanding.

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[96] *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 499, 80 S.Ct. 419, 432, 4 L.Ed.2d 454, 470 (1960). See also *NLRB* v. *Local 103, Int'l Ass'n of Iron Workers*, 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586, 598-599 (1978); *NLRB* v. *Truck Drivers Local 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676, 682 (1957).

[97] *NLRB* v. *Local 103, Int'l Ass'n of Iron Workers*, *supra* note 96.

[98] *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967 13 L.Ed.2d 855, 867 (1965). See also *NLRB* v. *Insurance Agents' Int'l Union*, *supra* note 96, 361 U.S. at 499, 80 S.Ct. at 432, 4 L.Ed.2d at 470.

We believe also that our construction of Section 8(b)(4)(ii)(B) is necessary to avoid a possible confrontation with the First Amendment. When legislation otherwise suspect is fairly susceptible to an interpretation shielding it from constitutional doubt, federal courts are duty bound to give it that reading.[99] In *Tree Fruits* the Court observed that "[t]hroughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." [100] "Both the congressional policy and our adherence to this principle of interpretation," the Court said, "reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." [101] Section 8(b)(4)(ii)(B) has before been accused of encroaching upon those hallowed freedoms,[102] and the Board's nebulous inferred—intent approach to its op-

[99] *Johnson* v. *Robison*, 415 U.S. 361, 367, 97 S.Ct. 1160, 1165-1166, 39 L.Ed.2d 389, 398 (1974); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404-1405, 28 L.Ed.2d 822, 830 (1971); *United States* v. *Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545, 97 L.Ed. 770, 775 (1953).

[100] *Tree Fruits*, *supra* note 32, 377 U.S. at 62, 84 S.Ct. at 1066, 12 L.Ed.2d at 133.

[101] *Id.* at 63 84 S.Ct. at 1066, 12 L.Ed.2d at 133.

[102] *Id.* at 76, 84 S.Ct. at 1073, 12 L.Ed.2d at 141 (Black, J., concurring). In the instant case, the union levels a similar attack. Brief for Petitioner at 21-25; Supplemental Brief for Petitioner at 14-18.

eration [103] enlivens the specter of constitutional infirmity. Here, no less than in *Tree Fruits*, the call to sidestep uncertainty of that sort is imperative.[104]

The union's petition to set aside the Board's order is accordingly granted, and the Board's application for its enforcement is denied.

So ordered.

ROBB, *Circuit Judge, dissenting*: The purpose of section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) is to protect neutral employers, not concerned in a dispute between another employer and a union, from the pressures generated by that conflict. *NLRB* v. *Steel Fabricators Local 810 (Sid Harvey)*, 460 F.2d 1, 5 (2d Cir. 1972), *cert. denied*, 409 U.S. 1041 (1972); *Miami Newspaper Pressmen's Union No. 46* v. *NLRB*, 116 U.S. App. D.C. 192, 197, 322 F.2d 405, 410 (1963). Congress recognized that absent such protection neutral secondary employers frequently

[103] See text *supra* at notes 34-37. See also *Tree Fruits*, *supra* note 32, 377 U.S. at 82-83, 84 S.Ct. at 1076-1077, 12 L.Ed.2d at 144-145 (Harlan, J., dissenting).

[104] "We think that in light of *Tree Fruits* we may not hold Congress intended by section 8(b)(4) that the exercise of the arguable First Amendment right should turn for its lawfulness upon a factor exceedingly difficult to subject to line-drawing, and as to which a union exercising the claimed right might have poor information as to where to draw the line." *Dow Chem.*, *supra* note 22, 173 U.S.App.D.C. at 307, 524 F.2d at 861.

become "the helpless victims of quarrels that do not concern them at all." *Carpet Layers Local 419* v. *NLRB*, 151 U.S. App. D.C. 338, 343, 467 F.2d 392, 402, *quoting* H. REP. NO. 245, 80th CONG., 1st SESS. 23 (1974).

On substantial evidence the Labor Board found, and the majority of this court rightly agrees, that the land title companies were neutrals in the dispute between Safeco and the Union. The majority contends however that because the picketing was aimed at only the "struck product" it was within the exception to section 8(b)(4)(ii)(B) that the Supreme Court recognized in *NLRB* v. *Fruit & Vegetable Packers Local 760* (Tree Fruits) 377 U.S. 58 (1964). I do not agree.

The land title companies were not involved in the dispute between Safeco and the Union, and they had no power to resolve that conflict. Yet the majority would expose these neutral employers to the disruption if not the ruin caused by a complete boycott. I cannot believe that the National Labor Relations Act permits such a sacrifice of helpless victims. I think Congress in enacting section 8(b)(4)(ii)(B) intended to forbid union appeals for a complete boycott of a neutral secondary employer. Accordingly I would enforce the order of the National Labor Relations Board.

The dispute in *Tree Fruits* arose between Local 760 of the Fruit & Vegetable Packers and several fruit packers and warehousemen who sold Washington State apples to Safeway retail stores in Seattle, Washington. The union began picketing at the premises of the Safeway stores, urging customers not to buy Washington State apples. The Board ruled that the customer boycott violated section 8(b)(4)(ii)(B). It reasoned that " 'by literal wording of the [publicity] proviso as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a second establishment is prohibited.' " 132 N.L.R.B. 1172, 1177. This court denied enforcement of the Board's order because no evidence regarding the picket's impact on Safeway sales had been adduced. *Fruit & Vegetable Packers Local 760* v. *NLRB*, 113 U.S. App. D.C. 356, 308 F.2d 311 (1962). We remanded the case to the Board leaving it free to receive evidence on whether Safeway was in fact threatened, coerced, or restrained.

The Supreme Court vacated the judgment of this court and remanded with directions to enter judgment setting aside the Board's order. The Court held that the union's picketing of Washington State apples was legal because it was "employed only to persuade customers not to buy the struck product." 377 U.S. at 72. This holding was based on the Court's reading of the legislative history of the 1959 Amendments. The Court concluded that the legislative history did "not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites." *Id.* at 63. Instead, it showed that the "isolated evil" at which the section was directed was the use of consumer picketing "to persuade the customers of the secondary employer

to cease trading with him in order to force [the secondary employer] to cease dealing with, or to put pressure upon, the primary employer." *Id.* [emphasis added] The Court therefore reasoned that Congress intended not to outlaw boycotts such as Local 760's if directed at only the struck product, but to prohibit "union appeal[s] to the public at the secondary site not to trade at all with the secondary employer." *Id.*

The majority argues in this case that regardless of the intended or foreseeable effect of its picketing on the land title companies, the picketing is lawful under the holding in *Tree Fruits* because it followed the struck product, Safeco insurance. The Court in *Tree Fruits*, however, repeatedly stressed that section 8(b)(4)(ii)(B) proscribes picketing which is intended to persuade the customers of a secondary employer to cease dealing with him. And the Board has found here that the Local was seeking a "virtually complete boycott of the land title companies." Thus, the legislative history recounted by the Court in its *Tree Fruits* opinion amply demonstrates that the Local's conduct was one of the "isolated evils" at which the section was directed.

Neither Congress in the legislative history accompanying the 1959 Amendments, nor the Court in its decision in *Tree Fruits*, intimated that a neutral secondary employer loses his protection against a union-inspired total boycott if his only item of merchandise is the struck product. Thus, Senator McClellan, as revealed in the portion of the legislative history relied on by the Court in its *Tree Fruits* de-

cision, believed that such employers would be protected:

> I point out that we have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some other company. The merchant may have built up his trade entirely on that product.

II Leg. Hist. 1194. Senator McClellan went on to say that these merchants should be protected from secondary boycotts, including those aimed at their customers. *Id.*

Moreover, instead of suggesting that its holding is applicable to a case like the one before us, the *Tree Fruits* decision plainly shows that it does not apply to cases in which a retailer sells only the struck product. The Court there recognized that Washington State apples "were only one of numerous food products sold in [Safeway] stores." 377 U.S. at 60. Furthermore, the Court believed that if the boycott at Safeway Stores were successful, the harshest result would be that "Safeway [might] drop the item as a poor seller." *Id.* at 72-73; *see id.* at 72 n.20. That the Court did not intend the exception it recognized for picketing of struck products to encompass and immunize total boycotts is again manifested by its observation that "consumer picketing to shut off all trade with the secondary employer . . . is poles apart

from such picketing which only persuades his customers not to buy the struck product." *Id.* at 70. Picketing to shut off all trade, said the Court, is to be barred. *Id.* at 71; *see id.* at 63. The minimal impact to Safeway that the Court envisioned in *Tree Fruits* is thus hardly congruent with what the Board found the union's objective to be in this case—a total loss of patronage to the land title companies. In *Tree Fruits* the struck product provided only a small portion of the company's business, so it presented a target separate from the business itself. Here the land title companies sell only insurance underwritten by Safeco and derive 90-95 percent of their income from such sales. Their other income comes from services ancillary to the issuance of title insurance policies. Thus their business is co-extensive with the product.[1]

My conclusion is supported by the decision of this court in *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U.S. App. D.C. 1, 401 F.2d 952 (1968), and by the opinions of other circuit courts that have analyzed section 8(b)(4)(ii)(B) since the decision

[1] Nor does the section's prohibition against the picketing in this case raise substantial first amendment questions; for "[r]ead as barring only picketing urging total consumer boycott, . . . the statute strikes narrowly at those 'inherently compulsive features' present when consumers must cross a line." Honolulu Typographical Union No. 37 v. NLRB, 131 U.S. App. D.C. 1, 6 n.11, 401 F.2d 952, 957 n.11 (1968); *see* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Hughes v. Superior Court 339 U.S. 460 (1950).

in *Tree Fruits*.[2] In the *Honolulu Typographical* case a union engaged in a strike against a newspaper picketed several restaurants that advertised in the struck newspaper. The pickets carried signs stating that the restaurants advertised in the paper, and urging customers not to "purchase their products advertised in the struck" newspaper. The union thus sought to restrict its appeal to a boycott of the

[2] The only circuit court opinion that has reached a contrary result is the panel decision of this court in United Steelworkers Local 14055 v. NLRB (Dow Chemical), 173 U.S. App. D.C. 299, 524 F.2d 853 (1975), *noted in* 7 TEX. TECH. L. REV. 645 *and* 54 U. DET. J. URB. L. 579. The panel held that consumer picketing was lawful so long as it followed the struck product, regardless of its foreseeable effect on the secondary employers whose revenues were derived primarily from the sale of the struck product. The Supreme Court however vacated the judgment in that case and remanded the case with directions to remand the case to the Board for reconsideration in light of intervening circumstances. 429 U.S. 807. On remand the Board dismissed the complaint as moot. 229 N.L.R.B. No. 43, 96 L.R.R.M. 1090 (April 27, 1977).

The Union concedes that the opinion in *Dow Chemical* is not controlling. Brief for Petitioner at p. 11 n.6; *see* New York Stock Exchange, Inc. v. Bloom, 183 U.S. App. D.C. 217, 224 n.6 562 F.2d 743, n.6 (1977), *cert. denied*, 98 S.Ct. 1520 (1978) ("the precedential value of this court's decision . . . was substantially diminished by the action of the Supreme Court in taking the case for review on the merits, which did not come about only by reason of the intervention of mootness").

The Board in its opinion in this case fully considered the views expressed by the panel in *Dow Chemical*, *see* J.A. 10 n.15, but it declined to adopt the holding of that case. Similarly, I have considered the thinking of the panel there, but for the reasons stated in the text I reach a different result.

"struck product". *See* 131 U.S. App. D.C. at 3-4; 401 F.2d at 954-55. We concluded, however, that "[t]he only realistic meaning of the appeal is the traditional 'do not patronize this establishment.'" 131 U.S. App. D.C. at 3, 401 F.2d at 954. Relying on the Supreme Court's distinction in *Tree Fruits* between limited and total boycotts, we held that when the struck product had "so merged into the seller's total business as to be indistinguishable therefrom", a boycott of the *struck product* was illegal.[3] 131 U.S. App. D.C. at 4-5; 401 F.2d at 955-56. We acknowledged that our interpretation of *Tree Fruits* granted sellers of a "merged product" greater immunity than that available to ordinary retailers, but we concluded that such protection was justified because:

[3] In *Honolulu Typographical*, 131 U.S. App. D.C. at 5 n.9, 401 F.2d at 956 n.9, we observed that when a secondary employer sells only the struck product, the concept of neutrality and the applicability of *Tree Fruits* may become intertwined. This is indeed true. In *Carpet Layers, supra*, we held that a secondary employer did not become allied merely becasue he was economically dependent on the primary. *Accord*, NLRB v. Electrical Workers Local 3, 542 F.2d 860, 865-66 (2d Cir. 1976); Kinty v. UMW, 544 F.2d 706, 717 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977). We therefore held that the secondary employer in that case was protected by section 8(b)(4)(ii)(B). Similarly, in this case we have affirmed the Board's finding that the land title companies were neutral notwithstanding that they sell only Safeco insurance. By holding lawful a total boycott of these neutral secondary employers because it was aimed at only the struck product—the companies' sole product—we would render our holding in *Carpet Layers* and the Board's finding largely meaningless.

> Here, where picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection.

131 U.S. App. D.C. at 5, 401 F.2d at 956.

Our holding in *Honolulu Typographical Union No. 37* v. *NLRB* was followed by the Court of Appeals for the Sixth Circuit in *American Bread Co.* v. *NLRB*, 411 F.2d 147 (1969). Similarly, in *Hoffman* v. *Cement Masons Local 337*, 468 F.2d 1187, 1190-91 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), the court reasoned that the *Tree Fruits* decision is inapposite in a case in which the struck product is the secondary employer's sole product. In both these opinions the courts recognized that the holding in *Tree Fruits* does not apply when the union appeal necessarily asks for a total boycott of a secondary employer, and that in such instances the interests of the neutral secondary must prevail.

Finally, I think "[t]he Board's resolution of the conflicting claims in this case represents a defensible construction of the statute and is entitled to considerable deference." *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978). As an acceptable reading of the statutory language and a reasonable implementation of the purposes of section 8(b)(4)(ii)(B), it

is not to be lightly disturbed. *Id.* at 341. For " '[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' " *Id.* at 350, *quoting Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 96 (1957); *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 499 (1960).

I respectfully dissent. The Board's order should be enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 76-2015

[Filed June 29, 1979]

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

SAFECO TITLE INSURANCE CO., INTERVENOR

PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review and cross application for enforcement of an order of the National Labor Relations Board; briefs

and supplemental memoranda were filed by the parties; and the case was argued initially before a panel of this Court, and subsequently, before the Court, sitting *en banc*. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, *en banc* that the petition for review is granted, the order on review is vacated, and respondent's cross application is denied. Opinion(s) will follow.

A true copy:

Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ Joyce E. Trimboli
Deputy Clerk

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would affirm the Board's order on review.

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

MFJPW
D—1727
Seattle, Wash.

226 NLRB No. 106

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-CC-760

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO

and

Case 19-CC-777

LAND TITLE INSURANCE CO. OF PIERCE COUNTY

and

SAFECO TITLE INSURANCE COMPANY

DECISION AND ORDER

Upon unfair labor practice charges filed on March 24, 1975, by Land Title Insurance Company of Pierce County and on May 8, 1975, by Safeco Title Insurance Company, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued on May 30, 1975, a consolidated complaint against Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO, hereafter referred to as Respondent. The complaint alleges that Respondent violated Section 8(b)(4)(i) and (ii)(B) by engaging

in picketing at the premises of Land Title Co. of Snohomish County, Land Title Co. of Pierce County, Land Title Co. at Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County [1] on dates between February 19 ad April 15. Respondent filed a timely answer to the consolidated complaint denying the commission of any unfair labor practices.

On September 11, 1975, the Respondent, the Charging Parties, and the General Counsel entered into a stipulation of facts for submission to the Board. In the stipulation the parties agreed that the charges, consolidated complaint, answer, and the stipulation of facts and exhibits attached thereto constitute the entire record in the case; waived all intermediate proceedings before an Administrative Law Judge; and stated that they desired to have the case submitted directly to the Board for it to make findings of fact and conclusions of law. On October 1, 1975, the Board approved the stipulation and transferred the proceeding to itself. Thereafter, timely briefs were filed by General Counsel, Charging Party Safeco Title Insurance Company, and Respondent.

The Board has considered the entire record herein, as stipulated to by the parties, as well as their briefs, and makes the following findings of fact and conclusions of law.

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[1] Hereafter referred to collectively as the land title companies.

Findings of Facts

I. Jurisdiction

Safeco Title Insurance Company (herein called Safeco), a California corporation, is engaged in the operation of a title insurance company and related escrow services in the State of Washington. The complaint alleges, and the answer admits, that during 1974 Safeco's total dollar volume of sales and performances equaled or exceeded $500,000, and it purchased goods and services from outside the State of Washington valued in excess of $50,000. The answer also admits, and we find, that Safeco is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint further alleges, and the answer admits, that Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County are engaged in researching title to real estate, issuing title insurance policies, and performing escrow services. Each grossed in excess of $100,000 from its operations in 1974, a representative year. Respondent admits and we find that they are persons within the meaning of Section 2(1) of the Act and are engaged in commerce or an industry affecting commerce within the meaning of Sections 2(6) and (7) and 8(b)(4) of the Act.[2]

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[2] Safeco being the "primary employer" herein, we assert jurisdiction on the basis of its satisfying the Board's discretionary standards therefor, without regard to whether any

II. The Labor Organization Involved

Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Facts*

Safeco is a California corporation engaged in the operation of a title insurance company in Seattle, Washington. Respondent was certified as the collective-bargaining representative of the Safeco employees in July 1974, following which Respondent and Safeco engaged in contract negotiations. The negotiations reached an impasse in November 1974, and on November 18, 1974, Respondent commenced a strike against Safeco which at the time of the stipulation was still in progress. On various dates between February 19 and April 15, 1975, strikers, with the knowledge and authority of Respondent, patrolled at each of the five land title insurance companies with signs reading:

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of the land title companies, who are the "secondary employers" for the purposes of this case, meets those standards. *Local 14055, United Steelworkers of America, AFL-CIO (The Dow Chemical Company)*, 211 NLRB 649 (1974), enforcement denied on other grounds 524 F.2d 853 (C.A.D.C., 1976), cert. granted and judgment vacated and remanded for consideration of intervening circumstances concerning the alleged dissolution of the respondent union (Oct. 4, 1976).

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

On each occasion handbills were distributed to the general public asking consumers to cancel insurance policies with Safeco Group insurance companies. These activities did not, however, result in any work stoppage or interference with deliveries at any of the land title companies.

The land title companies are all Washington corporations engaged in the business of issuing title insurance policies, all of which are underwritten by Safeco. Each policy or title commitment issued by one of these land title companies bears the signature of W. H. Little, president of Safeco, and is countersigned by a land title company employee designated as an assistant secretary or other officer of Safeco. The written consent of Safeco is required for commitments of title coverage in excess of a limit set for each land title company.[3] From 90 to 95 percent of the total income of each land title company is derived from the issuance of Safeco title insurance policies; the remainder, in each case, is derived from title research and escrow services.

Safeco owns the following percentages of the outstanding stock of the various companies: Land Title Co. of Snohomish County—28 percent; Land Title

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[3] These limits vary from $50,000 to $150,000.

Co. of Kitsap County—20 percent; Land Title Co. of Cowlitz County—12 percent; Land Title Co. of Clark County—53 percent; Land Title Co. of Pierce County —38 percent. The remaining stock of these companies is held by various individuals. An officer of Safeco has always served as an officer and member of the board of directors of each land title company.[4]

There is no interchange of employees between Safeco and the land title companies. Furthermore, Safeco has no control over the personnel policies of the land title companies; each is autonomous in establishing policies with regard to wages, hours, and other terms and conditions of employment.

B. *Contentions of the Parties*

General Counsel and the Charging Parties contend that Respondent violated Section 8(b)(4) by picketing in an attempt to cause customers of the land title companies to cease doing business with Safeco. Thus, they note that Respondent is seeking to persuade customers of the land title companies to refrain from purchasing insurance. They argue, relying on *Dow Chemical, supra*, that, since the title insurance is underwritten by Safeco, if Respondent's appeal is successful it would mean that upwards to 90 percent of the land title companies' business would be lost. Under such circumstances, the land title companies, which have no dispute with Respondent, would be

[4] Two officers of Safeco serve on the board of directors of Land Title Co. of Clark County, one of whom is also secretary of the latter company.

forced to cease doing business with Safeco. In addition, Charging Party Safeco, relying on the *American Bread,*[5] *Honolulu Typographical,*[6] and *Cement Masons*[7] cases, contends that the consumer appeals were illegal because the struck product, Safeco title insurance policies, has become so incorporated in the business of the "secondary employer" land title companies that it would be impossible for the consumer to comply with the request to boycott the struck product without also boycotting the total business of the "neutral" land title companies.

Charging Party Safeco argues also, again relying on *Cement Masons* and *Honolulu Typographical, supra*, that the picketing herein was illegal in that the signs inadequately identified the struck product, failed to state that the picketing was consumer picketing, and contained an untrue statement, *viz* that Safeco was nonunion.

Respondent contents that by virtue of Safeco's ownership interests in the land title companies and

[5] *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (American Bread Company)*, 170 NLRB 91 (1968), enfd. 411 F.2d 147 (C.A. 6, 1969).

[6] *Honolulu Typographical Union No. 37, AFL-CIO (Hawaii Press Newspapers, Inc.)*, 167 NLRB 1030 (1967), enfd. 401 F.2d 952 (C.A.D.C., 1968).

[7] *Cement Masons Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO (California Association of Employers)*, 190 NLRB 261 (1971); 192 NLRB 377 (1971).

its actual participation in the vast majority of the land title companies' business transactions, any picketing activity against Safeco at the land title companies was primary activity. Further, it contends that the picketing involved herein was lawful in that the pickets limited their appeal to the struck product only. Respondent urges that under *Tree Fruits* [8] the test for determining the legality of consumer appeals is not the economic injury to the secondary employer but rather whether the picketing was limited to the struck product only and that *Dow Chemical, supra,* was incorrectly decided. Finally, Respondent contends that the application of Section 8(b)(4)(B) here would violate the first amendment right of free speech, since it would constitute an attempt to prohibit picketing, not because of conduct associated with the picketing but because of the message the pickets were attempting to convey to the public.

C. *Analysis and Discussion*

1. Neutrality

The initial issue in this case is whether the land title companies are neutral employers with respect to the dispute between Safeco and Respondent. The question of neutrality can be resolved only by considering in each case the factual relationship between the alleged secondary employer and the primary em-

[8] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of IBT [Tree Fruits Labor Relations Committee, Inc.]*, 377 U.S. 58 (1964).

ployer in light of the congressional intent to protect employers who are unconcerned and not involved in the labor dispute of the union and the primary employer.[9]

The Board and courts have found two commonly owned companies to be secondary and neutral with respect to the labor disputes of each other where there is no actual or active common control of day-to-day operations or labor relations.[10] Even where there is no such common control, however, the "other" employer is not automatically entitled to the protection of Section 8(b)(4) as a neutral or secondary employer. Thus, where one employer is performing the "struck work" for the primary employer or where a combination of circumstances indicates the employers are engaged in an integrated straight-line operation, the Board has found separate employers to be "allies" and not neutrals within the meaning of Section 8(b)(4). The factors or circumstances the Board considers in determining whether two or more em-

[9] *N.L.R.B.* v. *Local 810, Steel, Metals, Alloys & Hardware Fabricators & Warehousemen, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Sid Harvey, Inc.]*, 460 F.2d 1 (C.A. 2, 1972), cert. denied 409 U.S. 1041.

[10] *Miami Newspapers Printing Pressmen Local No. 46, a Subordinate Local Union of International Printing Pressmen and Assistants' Union, AFL-CIO (Knight Newspapers, Inc.)*, 138 NLRB 1346 (1962), enfd. 322 F.2d 405 (C.A.D.C., 1963); *Drivers, Chauffeurs, and Helpers Local No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Poole's Warehousing, Inc.)*, 158 NLRB 1281 (1966).

ployers are "allies" are the degree of common ownership; the common control of day-to-day operations, including labor relations; the extent of integration of business operations; and the dependence of one employer on the other for a substantial portion of its business.[11] None of these factors alone is sufficient; rather the Board weighs all of them to determine whether in fact one employer is involved in or is wholly unconcerned with the labor disputes of the other.[12]

Applying the above-stated principles, we find that the land title companies are neutral and separate employers with respect to Safeco's dispute with Respondent. Safeco is a minority shareholder in all cases with the exception of Land Title Co. of Clark County, and thus has no potential for exercising con-

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[11] *Graphic Arts International Union Local 262, AFL-CIO (London Press, Inc.)*, 208 NLRB 37 (1973); *N.L.R.B.* v. *Local 810, Hardware Fabricators, IBT* [*Sid Harvey, Inc.*], *supra.*

[12] See *Dow Chemical, supra,* where the Board found that economic interdependency alone was insufficient to predicate loss of neutral status; *Dairy Employees' Union, Local 754, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Glenora Farms Dairy, Inc.)*, 210 NLRB 483 (1974), where the Board found two employers to be neutral and separate persons even though the secondary employer owned 100 percent of the shares of the primary employer and the secondary employer, who was engaged in the wholesale and retail sale and distribution of milk and related products, purchased 95 percent of the processed milk it distributed from the primary employer. See also *Sid Harvey, Inc., supra* at 7.

trol over any but the latter company.[13] The parties stipulated, and we find, that there is no interchange of employees between the land title companies and Safeco and that Safeco has no control over the labor relations policies of any of the land title companies. And, although the parties stipulated that one member of the board of directors of each of the land title companies (two in the case of Land Title Co. of Clark County) is an officer of Safeco, the record indicates that Safeco is not involved in any way in their day-to-day operations. Safeco is, as Respondent urges, a party to each title insurance policy issued by a land title company. However, the type and degree of collaboration between the principal or underwriter and agent required for the issuance of insurance policies is not such as to warrant a finding that the two are engaged in an integrated business operation. There is no contention that employees of the land title companies were performing struck work. Accordingly, the only factor in the instant case which would plausibly negative the claim that the land title companies are neutral employers is their economic dependency on Safeco, since each land title company derives between 90 and 95 percent of its total income from the issuance of Safeco policies. However, in *Dow Chemical Company, supra,* the Board majority held that economic interdependency alone was not

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[13] This factual difference between Land Title Co. of Clark County and the other land title companies does not lead to a different legal conclusion inasmuch as Land Title Co. of Clark County was no more dependent on or controlled by Safeco than were the other companies.

sufficient basis upon which to predicate loss of neutral status. Therefore, we find that the land title companies are secondary employers entitled to the protection of Section 8(b)(4)(B).

2. Application of the *Tree Fruits* doctrine

Having found that the land title companies are neutral employers within the meaning of Section 8(b)(4)(B), we turn to the issue of the legality of Respondent's consumer appeals. The Supreme Court in *Tree Fruits*[14] held that Section 8(b)(4)(B) does not proscribe consumer picketing which is employed only to persuade customers not to buy the struck product as opposed to picketing to persuade customers not to trade at all with the secondary employer. Consistent with this distinction, the Board in *Dow Chemical, supra,* held that the *Tree Fruits* doctrine is not applicable where the picketing is reasonably calculated to induce customers not to patronize the neutral parties at all. The predictability that a successful effort in this regard would result in forcing the secondary employer to go out of business or to abandon the primary employer led the Board to conclude in *Dow Chemical* that the picketing had an unlawful object.[15]

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[14] *N.L.R.B.* v. *Fruit and Vegetable Packers & Warehousemen, Local 760* [*Tree Fruits Labor Relations Committee, Inc.*], 377 U.S. 58 (1964).

[15] We have fully considered the views expressed by the Court of Appeals for the District of Columbia in its opinion in *Dow Chemical.* With all due respect to that court, we continue to adhere to the views expressed in the Board's opinion in that case.

We find that the facts of the present case indicate that a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the land title companies. Between 90 and 95 percent of the title companies' gross revenues is derived from the issuance of Safeco policies. The remainder is derived from sources which are largely ancillary to the issuance of title insurance policies, e.g., title research and escrow services. Respondent's activities therefore had the predictable result of dragging the land title companies into its dispute with the primary employer, Safeco. The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful. We find, therefore, that Respondent's consumer appeal constitutes coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.[16]

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[16] In view of this determination, we find it unnecessary to pass on Charging Party Safeco's contention that the picket sign was improper. Although the complaint alleges a violation of Sec. 8(b)(4)(i)(B), the General Counsel does not there or in its brief allege or contend that Respondent appealed to any employee to engage in a work stoppage. We therefore find it unnecessary to pass on whether the Respondent's consumer activities violated Sec. 8(b)(4)(i)(B) and shall limit our remedy to the 8(b)(4)(ii)(B) conduct. *Laundry, Dry Cleaning & Dye House Workers International Union, Local No. 259, affiliated with the Laundry, Dry Cleaning & Dye House Workers International Union (Morrison's of San Diego, Inc., d/b/a California Laundry & Linen Supply),* 164 NLRB 426, 428 1967).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, we make the following:

Conclusions of Law

1. Safeco Title Insurance Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By its picketing at the premises of Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County, in furtherance of a dispute with Safeco Title Insurance Company, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Retail Store Employees Union Local 1001, Retail Clerks International Association, AFL-CIO, Seattle, Washington, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, or restraining Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County, or any other person, where an object thereof is to force or require any of them to cease doing business with Safeco Title Insurance Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[17]

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[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PUR-

Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by a duly authorized representative of the Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 19 copies of the aforementioned notice for posting by Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County, these companies willing, at the picketed offices.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges unfair labor practices other than those specifically found above.

SUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C., Nov. 3, 1976

/s/ Betty Murphy
BETTY SOUTHARD MURPHY,
Chairman

/s/ John A. Penello
JOHN A. PENELLO, Member

/s/ Peter D. Walther
PETER D. WALTHER, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBERS FANNING and JENKINS, dissenting:

Our colleagues find this case to be similar to *Local 14055, Steelworkers (Dow Chemical Co.)*, 211 NLRB 649, enforcement denied 524 F.2d 853 (C.A.D.C., 1975), cert. granted (Oct. 4, 1976), and find the violation on the principles expressed by the majority there. For the reasons set forth in our dissent in *Dow*, we would dismiss this complaint.

Our colleagues assert that consumer picketing, otherwise lawful, becomes unlawful "where the picketing is reasonably calculated to induce customers not to patronize the neutral parties at all." However, they do not support their argument with any facts present in this case; and the only fact from which a union objective to stop the consumer patronage of nonstruck goods or services offered by the "neutrals"

can be inferred here is that the vast majority of the neutrals' offerings were struck goods or services. Since the picketing concededly was limited to the struck goods, what the majority are in fact saying is that they will ignore such limitation and find the picketing unlawful simply because it affects a major portion of the secondary employer's business, and can possibly affect all of it. But even if some prospective customers decide not to purchase nonstruck goods at the picketed premises because they prefer one-stop shopping, that no more makes the Union's objective unlawful than does a consumer's decision not to cross a lawful consumer picketing line. Thus, the majority's logic comes down to a holding that lawful consumer picketing becomes unlawful when it has a large or substantial impact on the secondary employer's business. We see nothing in the Supreme Court's *Tree Fruits* decision which indicates that consumer picketing, otherwise lawful, becomes unlawful when it may leave the inconsequential or ineffective level and have a significant impact on the secondary's business in which he sells the struck product.

A further indication of the primary nature of the picketing here is the relation between Safeco, the struck employer, and the picketed title companies which marketed Safeco's product. The title insurance provided by Safeco constituted 90 to 95 percent of these other companies' business, and they are agents exclusively for Safeco and for no other title insurance company. Thus, they are no more than an

arm of Safeco, and hardly the neutral employers our colleagues consider them.

Dated, Washington, D.C., Nov. 3, 1976

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

D—1727

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, by picketing their premises, threaten, coerce, or restrain Land Title Co. of Snohomish County, Land Title Co. of Clark County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, Land Title Co. of Pierce County, or any other person where an object thereof is to force or require any of them to cease doing business with Safeco Title Insurance Company.

RETAIL STORE EMPLOYEES UNION LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO
(Labor Organization)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 29th Floor, 915 Second Avenue, Seattle, Washington 98174, Telephone 206—442-7472.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 302865 101

Supreme Court, U. S.
FILED
FEB 23 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—v.—

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1979
CERTIORARI GRANTED JANUARY 7, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner

—v.—

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Order of the Supreme Court granting the petition for a writ of Certiorari 47

The decision of the Board and the decision and judgment of the court of appeals were printed in the petition for a writ of certiorari and need not be reprinted.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Case Nos.: 19-CC-760 & 19-CC-777

In the Matter of: Retail Store Employees Union, Local 1001, Retail Clerks International Association, AFL-CIO

3.24.75 Charge in 19-CC-760 filed

4.29.75 Complaint and Notice of Hearing in 19-CC-760, dated

5.9.75 Charge in 19-CC-777 filed

5.30.75 Order Consolidating Cases, Consolidated Complaint and Rescheduling Notice of Hearing, dated

8.29.75 Petitioner's Answer to Consolidated Complaint, dated

9.11.75 Stipulation of Facts for Submission to the Board entered into by the Petitioner, Charging Parties, and General Counsel, dated

10.1.75 Board's Order Approving Stipulation and Transferring Proceeding to the Board, dated

11.3.76 Decision and Order issued by the National Labor Relations Board

FORM NLRB-508
(12-65)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 19-CC-760

Date Filed 3-24-75

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: Retail Store Employees Union Local 10081, Retail Clerk's International Assoc. AFL-CIO

b. Union Representative to Contact: William Orwell

c. Phone No.: 682-8353

d. Address (Street, city, State and ZIP code): 2819 First Avenue, Seattle, WA 98116

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) RYM (4)(i)(ii)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about March24, 1975, it, by its officers, agents, or representatives has picketed Land Title Co. of Pierce County, at its offices located at 936 Pacific Avenue, Tacoma, WA, with an object of enducing employees employed by Land Title Co. of Pierce County to engage in a strike and to threaten, coerce, and restrain Land Title Co. of Pierce County with an object of forcing or requiring Land Title Co. of Pierce County to cease doing business with Safeco Insurance Company.

3. Name of Employer: Land Title Co. of Pierce County

4. Location of Plant Involved (Street, city, State and ZIP code): 936 Pacific Avenue, Tacoma, WA 98405

5. Type of Establishment (Factory, mine, wholesaler, etc.): Land Title Company

6. Identify Principal Product or Service: Title Insurance
Title research, escro svces

7. No. of Workers Employed: 24

8. Full Name of Party Filing Charge: Land Title Insurance Co. of Pierce County

9. Address of Party Filing Charge (Street, city, State and ZIP code): 936 Pacific Avenue, Tacoma, WA 98405

10. Telephone No.: 572-4444

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Jerome F. McCarthy (Signature of representative or person making charge) Attorney (Title or office, if any)

Address: JEROME F. McCARTHY
2200 One Washington Plaza
Tacoma, Washington 98402

572-5050 (Telephone number)

3.24.75 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 855-496

EXHIBIT A

2

FORM NLRB-508
(12-63)

Form Approved
Budget Bureau No. 64-R003.12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 19-CC-777

Date Filed 5-9-75

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name: RETAIL STORE EMPLOYEES LOCAL 1001

b. Union Representative to Contact: William Olwell

c. Phone No.: 682-8353

d. Address (Street, city, State and ZIP code): 2819 First Avenue, Seattle, WA 98121

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (4)(B) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Local 1001 represents certain of the employees of Safeco Title Insurance Company and is currently on strike against that company. Within the past six months, Local 1001, its representatives and agents, have picketed independent employers because of the relationship between those employers and Safeco Title Insurance Company. The independent employers, at whose locations Local 1001 and its representatives have picketed, are as follows: Land Title Company of Pierce County; Land Title Company of Snohomish County, Inc.; Land Title Company of Clark County; Land Title Company of Kitsap County; and Land Title of Cowlitz County, Inc. Each of these employers is independent from Safeco Title Insurance Company and is entitled to the protection of Section 8(b)(4)(B) of the Act. The purpose of the picketing of the independent employers by Local 1001 comes within the proscriptions of Section 8(b)(4)(B).

3. Name of Employer: SAFECO TITLE INSURANCE COMPANY

4. Location of Plant Involved (Street, city, State and ZIP code): 1109 Second Avenue, Seattle, WA 98101

5. Type of Establishment (Factory, mine, wholesaler, etc.): Title insurance company

6. Identify Principal Product or Service: Title insurance

7. No. of Workers Employed: 105

8. Full Name of Party Filing Charge: SAFECO TITLE INSURANCE COMPANY

9. Address of Party Filing Charge (Street, city, State and ZIP code): 1109 Second Avenue, Seattle, WA 98101

10. Telephone No.: 623-0870

11. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Bruce Michael Cross (Signature of representative or person making charge) Attorney (Title or office, if any)

Bruce Michael Cross

Address 1900 Washington Bldg, Seattle, WA 98101

682-8770 (Telephone number)

May 8, 1975 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

GPO 865-496

cc

H.P.C. No1

G.C. Ex. 1(G)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 19

Case No. 19-CC-760

Case No. 19-CC-777

RETAIL STORE EMPLOYEES UNION LOCAL NO. 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

LAND TITLE INSURANCE CO. OF PIERCE COUNTY

and

LAND TITLE INSURANCE CO. OF SNOHOMISH COUNTY

and

LAND TITLE INSURANCE CO. OF KITSAP COUNTY

and

LAND TITLE INSURANCE CO. OF COWLITZ COUNTY

and

LAND TITLE INSURANCE CO. OF CLARK COUNTY

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND RESCHEDULING NOTICE OF HEARING

It having been charged by Land Title Insurance Co. of Pierce County (herein called Land Title of Pierce), in Case No. 19-CC-760 and in Case No. 19-CC-777 by Land Title Insurance Co. of Snohomish County (herein called Land Title of Snohomish), by Land Title Insurance Co. of Kitsap County (herein called Land Title of Kitsap), by Land Title Insurance Co. of Cowlitz County (herein called Land Title of Cowlitz), and by Land Title Insurance Co. of Clark County (herein called Land Title of Clark), that Retail Store Employees Union Local No.

1001, Retail Clerks International Association, AFL-CIO (herein called Respondent), has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for Regional 19, acting pursuant to Section 10(b) of the Act and Sections 102.15 and 102.33 of the Board's Rules and Regulations, Series 8, as amended, hereby orders that these cases be, and they hereby are consolidated, and hereby issues this Order Consolidating Cases, Consolidated Complaint, and Rescheduling Notice of Hearing, and alleges as follows:

1. a. The charge in Case No. 19-CC-760 was filed on March 24, 1975, and a copy thereof was served upon Respondent by registered mail on or about that date.

b. The charge in Case No. 19-CC-777 was filed on May 9, 1975 and was served on Respondent by registered mail on or about that date.

2. a. Land Title of Pierce is a Washington corporation with offices located in Tacoma, Washington where it is engaged in researching title to real estate property, issuing title insurance policies, and performing escrow services.

b. During the past year, which period is representative of its annual operations generally, Land Title of Pierce, in the course and conduct of its business, grossed in excess of $300,000 from its operations.

c. Land Title of Snohomish is a Washington corporation located in Everett, Washington where it is engaged in researching title to real estate property, issuing title insurance policies, and performing escrow services.

d. During the past year, which period is representative of its annual operations generally, Land Title of Snohomish, in the course and conduct of its business, grossed in excess of $100,000 from its operations.

e. Land Title of Kitsap is a Washington corporation with offices located at Bremerton, Washington where it is engaged in researching title to real estate property, issuing title insurance policies, and performing escrow services.

f. During the past year, which period is representative of its annual operations generally, Land Title of Kitsap, in the course and conduct of its business, grossed in excess of $100,000 from its operations.

g. Land Title of Cowlitz is a Washington corporation located at Longview, Washington where it is engaged in researching title to real estate property, issuing title insurance policies, and performing escrow services.

h. During the past year, which period is representative of its annual operations generally, Land Title of Cowlitz, in the course and conduct of its business, grossed in excess of $100,000 from its operations.

i. Land Title of Clark is a Washington corporation with offices located in Vancouver, Washington where it is engaged in researching title to real estate property, issuing title insurance policies, and performing escrow services.

j. During the past year, which period is representative of its annual operations generally, Land Title of Clark, in the course and conduct of its business, grossed in excess of $100,000 from its operations.

k. At all times material herein, Safeco Title Insurance Co. (a California corporation), herein called Safeco, is, and has been, engaged in the operation of a title insurance company and related escrow services in the state of Washington.

l. During the past year, Safeco's total dollar volume of sales and performances equalled, or exceeded, $500,000 and it purchased goods and services from outside the state of Washington valued in excess of $50,000.

3. a. Safeco is, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

b. Land Title of Pierce, Land Title of Snohomish, Land Title of Kitsap, Land Title of Cowlitz and Land Title of Clark have been at all times material herein, persons engaged in commerce or industry affecting commerce within the meaning of Sections 2(1), (6), and (7), and 8(b)(4) of the Act.

4. Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. At all times material herein, Land Title of Pierce, Land Title of Snohomish, Land Title of Kitsap, Land Title of Cowlitz and Land Title of Clark each had contracts with Safeco under the terms of which all title insurance issued by the individual Land Title companies has been underwritten by Safeco.

6. At all times material herein, Respondent has been engaged in a labor dispute with Safeco.

7. At no time material herein has Respondent had a labor dispute with Land Title of Pierce, Land Title of Snohomish, Land Title of Kitsap, Land Title of Cowlitz or Land Title of Clark.

8. a. On or about March 24, 1975, Respondent picketed at the premises of Land Title of Pierce in Tacoma, Washington, in furtherance and support of its continuing dispute with Safeco as described above in paragraph 6.

b. On or about February 19, 1975, March 11, 1975, March 31, 1975 and April 2, 1975, Respondent picketed at the premises of Land Title of Snohomish in Everett, Washington in furtherance and support of its continuing dispute with Safeco as described above in paragraph 6.

c. On or about April 15, 1975, Respondent picketed at the premises of Land Title of Kitsap in Bremerton, Washington in furtherance and support of its continuing dispute with Safeco as described above in paragraph 6.

d. On or about March 19, 1975, Respondent picketed at the premises of Land Title of Cowlitz in Longview, Washington in furtherance and support of its continuing dispute with Safeco as described above in paragraph 6.

e. On or about March 19 and 20, 1975, Respondent picketed at the premises of Land Title of Clark in Vancouver, Washington in furtherance and support of its continuing dispute with Safeco as described above in paragraph 6.

f. The picket banners in each of the above cases carried the following language:

SAFECO NON-UNION
DOES NOT EMPLOY MEMBERS OF, OR
HAVE CONTRACT WITH,
RETAIL STORE EMPLOYEES UNION LOCAL 1001.

9. An object of the acts and conduct of Respondent as described in paragraph 8 above is, and has been, to force or require Land Title of Pierce, Land Title of Snohomish, Land Title of Kitsap, Land Title of Cowlitz and Land Title of Clark and other persons engaged in commerce or industry affecting commerce to cease doing business with Safeco.

10. By the acts described in paragraph 8 and by each of said acts, for the object described above in paragraph 9, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii) and (B) of the Act.

11. The acts described in paragraph 8 above, occurring in connection with the operations of Land Title of Pierce, Land Title of Snohomish, Land Title of Kitsap, Land Title of Cowlitz and Land Title of Clark described in paragraph 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii) and (B), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 5th day of August 1975, at 10 a.m., in Room 3086, Federal Building, 915 Second Avenue, Seattle, Washington a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. The hearing will continue on consecutive days thereafter until concluded. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as

taken from the Board's published Rules and Regulations and Statements of Procedure, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Consolidated Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in said Consolidated Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Seattle, Washington this 30th day of May, 1975.

/s/ Dan E. Boyd
DAN E. BOYD,
Acting Regional Director
National Labor Relations Board
Region 19
29th Floor, Federal Building
915 Second Avenue
Seattle, Washington 98174

G.C. Ex. 1(K)

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

REGION 19

Cases No. 19-CC-760 and 19-CC-777

RETAIL STORE EMPLOYEES UNION LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

LAND TITLE INSURANCE CO. OF PIERCE COUNTY, ET AL.

ANSWER TO CONSOLIDATED COMPLAINT

Retail Store Employees Union Local 1001, chartered by Retail Clerks International Association, AFL-CIO, herein called the Union, answers the Consolidated Complaint in the above-captioned matter as follows:

1. The Union admits the allegations of paragraphs 1 through 5.
2. The Union denies the allegations of paragraphs 7 through 11.

/s/ James H. Webster
JAMES H. WEBSTER
Attorney for Retail Store
Employees Union Local
1001, Chartered by Retail
Clerks International
Association, AFL-CIO

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed a copy of the foregoing Answer to Consolidated Complaint to the attorneys of record for the parties hereto, postage prepaid on August 29, 1975, as follows:

Jerome F. McCarthy
Gordon, Thomas, Honeywell, Malanca,
Peterson, O'Hern & Johnson
2200 One Washington Plaza
Tacoma, WA 98402

Bruce Michael Cross
Perkins, Cole, Stone, Olsen & Williams
1900 Washington Building
Seattle, WA 98101

/s/ James H. Webster
JAMES H. WEBSTER

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

REGION 19

Case No. 19-CC-760

Case No. 79-CC-777

RETAIL STORE EMPLOYEES UNION LOCAL NO. 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

LAND TITLE CO. OF PIERCE COUNTY

and

SAFECO TITLE INSURANCE COMPANY

STIPULATION OF FACTS
FOR SUBMISSION TO THE BOARD

Retail Store Employees Union Local No. 1001, Retail Clerks International Association, AFL-CIO (herein called Respondent), Land Title Co. of Pierce County (herein called Land Title Pierce), and Safeco Title Insurance Company (herein called Safeco), and Counsel for the General Counsel, being all parties to this proceeding, hereby stipulate to the transfer and submission of this proceeding directly to the Board in order to effectuate the purposes of the Act and to avoid any unnecessary cost and delay. The parties agree that the charges, Consolidated Complaint, Answer, all papers and exhibits, and the Stipulation of Facts herein, constitute the entire record in this case and that no oral testimony is necessary or desired by any party. The parties further stipulate that they waive a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of

law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's decision; and that they desire to submit this case for findings of fact and conclusions of law and order directly to the Board. In the event the Board accepts the Stipulation herein, the parties request that the Board set a time for the filing of briefs.

STATEMENT OF THE CASE

The matter herein initially arose from the charge filed by Land Title Pierce on March 24, 1975. Thereafter, on May 9, 1975, a second charge was filed by Safeco. After investigation of the aforementioned charges, the Regional Director for Region 19 caused a Consolidated Complaint to be issued on May 30, 1975. The Complaint, Consolidated Complaint, as well as Respondent's Answer and other formal papers herein, are submitted as General Counsel's Exhibit 1, to which the parties herein offer no objection.

Respondent, by virtue of its Answer to the Consolidated Complaint, admits that it is a labor organization within the meaning of Section 2(5) of the Act. Further, Respondent admits to the allegations as to jurisdiction contained in paragraphs 2 and 3 of the Consolidated Complaint.

Respondent was certified as the collective-bargaining representative of certain employees of Safeco on July 17, 1974.[1] Following such certification, Respondent has engaged in negotiations with representatives of Safeco concerning the provisions of an initial collective-bargaining agreement covering employees represented by Respondent. The negotiations reached an impasse in approximately November 1974, and Respondent commenced a strike against Safeco on November 18, 1974, which is still in progress.

During the negotiations, the chief spokesman for Safeco has been, and presently is, Carl Papenfus, Vice President of Safeco and Director of Personnel. Mr. Papenfus has his office at the office of the headquarters of Safeco in

[1] A copy of the certification is submitted as General Counsel's Exhibit 2, to which the parties herein offer no objection.

Panorama City, California. Throughout the negotiations, Mr. Paperfus has indicated repeatedly that he answers to and takes direction from his superiors at Safeco headquarters in Panorama City, California, including W. H. Little, President of the Company. Respondent has been actively engaged in picketing the premises of Safeco in Seattle, Washington since November 1974.

Land Title Pierce is a Washington corporation, organized in 1966, with offices located at 936 Pacific Avenue South, Tacoma, Washington. Land Title Pierce has seven directors on its board and since the Company was organized, there has always been an officer of Safeco serving as a member of the Board of the Company. At all times material herein, Richard E. Bader, a vice president of Safeco, has served as secretary and a member of the Board of Directors of Land Title Pierce. Safeco owns 38 percent of the outstanding stock of Land Title Pierce and the remaining 62 percent of the stock is held by various individuals. Land Title Pierce employs approximately 23 employees who are not represented by any labor organization. These employees perform their work in the Tacoma, Washington area and there is no interchange of employees between Land Title Pierce and Safeco. Safeco has no control over the personnel policies of Land Title Pierce with regard to wages, hours, and terms and conditions of employment of its employees.

Approximately 90 percent of the income of Land Title Pierce is derived from the issuance of title insurance policies. The remaining 10 percent is derived from performing title research and escrow services. Land Title Pierce is party to an agreement with Safeco whereby Safeco underwrites all title insurance issued by it.[2] The steps followed with respect to the issuance of title insurance by Land Title Pierce are:

(1) A request for issuance of title report is received.

(2) A search of the title is conducted.

[2] A copy of the present agreement between Safeco and Land Title Pierce is submitted as General Counsel's Exhibit 3 to which the parties herein offer no objection.

(3) A title report is issued along with commitment to insure setting forth the following information with respect to the property: taxes, easements, judgments, liens, and any title defects.

(4) On conveyance of the property, the title insurance policy is issued.

On March 24, 1975, individual strikers with knowledge and authority of Respondent patrolled at the premises of Land Title Pierce from approximately 8 a.m. to 10 a.m. The sign carried by the strikers had the following legend:

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

The activities described above that did occur on that date did not cause a work stoppage or interfere with deliveries.

Land Title Company of Snohomish County (hereinafter called Land Title Snohomish) is a Washington corporation organized in 1960 with the place of business located at 1510 Wall Street, Everett, Washington. The Company has nine directors, one of whom is Richard E. Bader, a vice president of Safeco. Safeco owns 20 percent of the outstanding stock of Land Title Snohomish. The remaining stock is held by various individuals.

Land Title Snohomish employs approximately 26 employees, none of whom are represented by any labor organization. These employees perform their work in the Everett area and there is no interchange of employees between th Company and Safeco. Safeco has no control over the personnel policies of Land Title Snohomish with regard to wages, hours, terms and conditions of employment.

Approximately 95 percent of the income of Land Title Snohomish is derived from the issuance of title insurance policies. The remaining 5 percent is derived from performing title research and escrow services. The Company is a party to an agreement with Safeco whereby Safeco

underwrites all title insurance issued by Land Title Snohomish.[3] The procedure for issuance of title insurance policies by Land Title Snohomish is identical with that described above with respect to Land Title Pierce.

On February 19, March 11, and March 31, 1975, individual strikers with the knowledge and authority of Respondent patrolled in front of the premises of Land Title Snohomish with signs carrying the following legend:

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

There has been no picketing since March 31, 1975. The activities of March 31, 1975, described above did not result in any work stoppage or interfere with any deliveries to Land Title Snohomish.

Land Title Company of Kitsap County (herein called Land Title Kitsap) is a Washington corporation organized in 1967, with offices located at 930 Park Avenue, Bremerton, Washington. The Company has six directors on its Board of Directors. Since the Company was formed there has always been an officer of Safeco serving as an officer and member of the board of Land Title Kitsap. Presently, Richard E. Bader, a vice president of Safeco, serves as secretary and a member of the Board of Directors.

Safeco owns approximately 28 percent of the outstanding stock of Land Title Kitsap. At the present time Land Title Kitsap has approximately 18 employees including those employed at its branch office in Port Angeles. The employees are not represented by any labor organization. All of the employees of Land Title Kitsap perform their work in Bremerton and the Port Angeles, Washington area and there is no interchange of employees between the Company and Safeco. Safeco has no control over the personnel policies of Land Title with regard to wages,

[3] A copy of the agreement between Land Title Snohomish and Safeco is submitted as General Counsel's Exhibit 4 to which the parties herein offer no objection.

hours, terms and conditions of employment of Land Title Kitsap employees.

Approximately 90 percent of the income of Land Title Kitsap is derived from the issuance of title insurance policies. The remaining income is derived from performing title research and escrow services. Land Title Kitsap is party to an agreement with Safeco whereby Safeco underwrites all title insurance issued by Land Title.[4] The procedure for issuance of title insurance policies by the Company is identical with that described above with respect to Land Title Pierce.

On April 15, 1975, individual strikers with the knowledge and authority of Respondent patrolled at the premises of Land Title Kitsap for approximately one and one-half hours carrying signs with the following legend:

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

No picketing has taken place since April 15, 1975. The activities of April 15, 1975 referred to above did not result in any work stoppage, nor was there any interference with deliveries to Land Title Kitsap.

Land Title Company of Cowlitz County (hereinafter called Land Title Cowlitz) is a Washington corporation organized in 1970 with offices located at 957 14th Avenue, Longview, Washington. Land Title Cowlitz has nine directors on its Board of Directors. Since the Company was formed there has always been an officer of Safeco serving as an officer and a member of the board of Land Title Cowlitz. Presently, Richard E. Bader, a vice president of Safeco, serves as the director and member of the Board of Directors of Land Title Cowlitz. Safeco owns 12 percent of the outstanding stock of Land Title Cowlitz. The remaining 88 percent of the stock is held by various individuals.

[4] A copy of the agreement between Safeco and Land Title Kitsap is submitted as General Counsel's Exhibit 5 to which the parties herein offer no objection.

At the present time, the Company employs approximately 8 employees. These employees are not represented by any labor organization. All of the employees perform their work in the Longview, Washington area and there is no interchange of employees between Land Title Cowlitz and Safeco. Safeco has no control over the personnel policies of Land Title Cowlitz with regard to wages, hours and terms and conditions of employment.

Approximately 90 percent of the income of Land Title Cowlitz is derived from the issuance of title insurance policies. The remaining 10 percent is derived from performing title research and escrow services. Land Title Cowlitz is a party to an agreement with Safeco whereby Safeco underwrites all title insurance policies issued by the Company.[5] The procedure for issuance of title insurance policies by the Company is identical with that described above with respect to Land Title Pierce.

On March 19, 1975, individual strikers with the knowledge and authority of Respondent patrolled the premises of Land Title Cowlitz from approximately 12 noon to 12:20 p.m. carrying signs with the following legend:

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

No picketing has taken place since March 19, 1975. The activities of that date referred to above did not result in any work stoppage, nor was there any interference with deliveries to Land Title Cowlitz.

Land Title Insurance Company of Clark County (hereinafter called Land Title Clark) is a Washington corporation organized in 1966 with offices located at 1200 Main Street, Vancouver, Washington. The Company has eight directors on its Board of Directors. Since the Company was formed there has always been an officer of Safeco asserting as an officer and member of the board

[5] A copy of the agreement between Safeco and Land Title Cowlitz is submitted as General Counsel's Exhibit 6 to which the parties herein offer no objection.

of Land Title Clark. Presently, Richard E. Bader, a vice president of Safeco, serves as secretary and member of the Board of Directors of the Company. Also, W. Sherwood Norton, a vice president of Safeco, is a member of the Board of Directors. Safeco owns 53 percent of the outstanding stock of Land Title Clark. The remaining 47 percent of stock is held by various individuals.

Land Title Clark employs approximately 8 employees. These employees are not represented by any labor organization. All of the employees perform their work in the Vancouver area and there is no interchange of employees between the Company and Safeco. Safeco has no control over the personnel policies of the Company with regard to wages, hours, terms and conditions of employment.

Approximately 93 percent of the income of Land Title Clark is derived from the issuance of title insurance policies. The remainder is derived from performing title research and escrow services. Land Title Clark is party to an agreement with Safeco whereby Safeco underwrites all title insurance issued by the Company.[6] The procedure for issuance of title insurance policies by the Company is identical with that described above with respect to Land Title Pierce.

On March 19 and 20, 1975, individual strikers with knowledge and authority of Respondent patrolled the premises of Land Title Clark from approximately 1:30 p.m. to 3 p.m. carrying signs with the following legend:

SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001.

No picketing has taken place since March 20, 1975. The activities of March 20, 1975 referred to above did not result in any work stoppage, nor was there any interference with deliveries to Land Title Clark.

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[6] A copy of the agreement between Safeco and Land Title Clark is submitted as General Counsel's Exhibit 7 which the parties herein offer no objection.

The parties further stipulate and agree as follows:

1. The alleged secondary employers (herein referred to as the Land Title Companies) do not have authority to issue title insurance policies in their own name. Instead, they are issued pursuant to the terms of the agency contracts between Safeco and the individual Land Title Companies. A sample copy of the title insurance policy form used by the Land Title Companies is submitted as General Counsel's Exhibit 8 to which the parties herein offer no objection.

2. On each occasion when individual strikers patrolled at the premises of the Land Title Companies handbills were distributed to the general public. A copy of the handbill distributed to the general public is submitted as General Counsel's Exhibit 9 to which the parties herein offer no objection.

3. Each title insurance policy issued by the Land Title Companies bears the signature of W. H. Little, President of Safeco, and is countersigned by a Land Title employee designated by Safeco as an Assistant Secretary or other authorized officer of Safeco. Each policy issued bears the Seattle address of Safeco.

This Stipulation is made without prejudice to any objection that any party may have as to the materiality, relevancy, or competency of any of the facts set forth herein.

Signed at Seattle, Washington this 11th day of Sept. 1975.

RETAIL STORE EMPLOYEES UNION
LOCAL NO. 1001, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO

By /s/ James H. Webster
JAMES H. WEBSTER
Attorney
(Title)

Signed at Tacoma, Washington this 27th day of August 1975.

LAND TITLE CO. OF PIERCE COUNTY

By /s/ Jerome F. McCarthy
JEROME F. MCCARTHY
Attorney
(Title)

Signed at Seattle, Washington this 2nd day of September 1975.

SAFECO TITLE INSURANCE COMPANY

By /s/ Bruce Michael Cross
BRUCE MICHAEL CROSS
Attorney
(Title)

Signed at Seattle, Washington this 15th day of August 1975.

Approval of the General Counsel
Recommended:

/s/ Ralph G. Wilmot, Jr.
RALPH G. WILMOT, JR.
Counsel for General Counsel
National Labor Relations Board
Region 19
2948 Federal Building
915 Second Avenue
Seattle, Washington 98174
APPROVED:

Date _____

Office of the General Counsel
National Labor Relations Board
Washington, D.C. 20570

GENERAL COUNSEL'S EXHIBIT 6

MODIFICATION OF AGENCY CONTRACT

KNOW ALL MEN BY THESE PRESENTS THAT:

WHEREAS, under the provisions of paragraph 4(b) of the Agency Contract effective November 11, 1971 between SECURITY TITLE INSURANCE COMPANY OF WASHINGTON, as principal, and LAND TITLE OF COWLITZ COUNTY, INC., as agent, any title commitment for coverage in excess of $50,000 must be approved by the principal, and

WHEREAS, it has been agreed between said principal and agent that the amount of such commitment requiring approval of the principal shall be changed to provide that commitments in excess of $75,000 shall require such approval,

NOW, THEREFORE, it is hereby agreed that said paragraph 4(b) of said Agency Contract is amended accordingly, to become effective immediately upon the execution of this Modification.

DATED: this 30th day of June, 1972.

SECURITY TITLE INSURANCE
COMPANY OF WASHINGTON

By: /s/ W. S. Norton
W. S. NORTON
President

Attest:

/s/ R. E. Bader
R. E. BADER
Senior Vice President
LAND TITLE OF COWLITZ COUNTY, INC.

By: /s/ Gerry A. Reitsch
GERRY A. REITSCH
President

By: /s/ Robert A. Bauer
ROBERT A. BAUER
Manager

Attest:
/s/ [Illegible]

Secretary

AGENCY CONTRACT

SECURITY TITLE INSURANCE COMPANY OF WASHINGTON, a Washington corporation, the Principal, and LAND TITLE OF COWLITZ COUNTY, INC., a Washington corporation, the Agent, by the execution hereof as of the 11th day of November, 1971, and in consideration of the covenants and agreements to be kept and performed by each party as herein specified, contract as follows:

1. The Principal does hereby appoint and authorize the Agent as a recording or policy writing agent of the Principal within the definition thereof under the Insurance Code of the State of Washington. The scope of such agency is limited to the solicitation of applications for and the execution and delivery in the name of the Principal of policies of title insurance, guaranteed certificates of title, reports preliminary to issurance of such policies or certificates, and related forms of commitment within the Authority herein conferred upon the Agent (such policies, certificates, reports, and other forms of commitment being hereinafter collectively referred to as "title commitments"), with respect to real property situate in Cowlitz County, State of Washington, and not elsewhere.

2. This contract of agency shall continue until cancelled by either party upon ninety days prior written notice to the other party, sent by registered mail. Liability for loss under the provisions of Paragraph 10 hereof shall not cease by termination of this agreement but shall continue as therein specified. All applications for title commitments accepted prior to the effective date of termination shall be completed in accordance with the terms hereof.

3. The Principal hereby covenants and agrees to and with the Agent as follows:

(a) That during the term of this agreement it will continue in force its appointment of the Agent as its agent under the Insurance Code of the State of Washington.

(b) That it will furnish to the agent all such forms as may be necessary to the proper conduct of such agency, including but not limited to:

Title Insurance Policies
Preliminary Commitment for
Title Insurance
Supplemental Title Reports
Closing Order
Instruments such as Deeds, Contracts, Mortgages, etc., which are distributed to the public, including affidavits, waivers, questionnaires and other forms used in conjunction with title defects.

Interoffice forms as such may be in use by the Principal.

(c) That it will from time to time nominate an officer or employee of the Agent as an Assistant Secretary of the Principal or as such other officer of the Principal as may be necessary, conferring upon such Assistant Secretary (or other officer) authority to countersign, validate and deliver any title commitment issued by the Agent and limiting his authority thereto.

(d) That during the term of this agreement it shall provide, without charge, all such advice and reasonable assistance to the Agent as may be necessary in connection with matters pertaining to the issuance of title commitments, policies or other title assurances, to be issued in the name of the Principal.

(e) That during the term of this agreement the Principal shall be and remain a qualified title insurer, complying with all requirements of the Insurance Code of the State of Washington.

4. The Agent hereby covenants and agrees to and with the Principal as follows:

(a) That it will at all times maintain a complete set of tract indexes covering all lands situate in Cowlitz County in accordance with the requirements of the Insurance Code of the State of Washington, and will maintain its principal place of business within said county. The Agent will display below its own name the name of the Principal thus:

Agent for Security Title Insurance Company
of Washington

(b) That no title commitment for coverage in excess of $50,000.00 shall be issued by the Agent except upon the written or verbal approval followed by written approval, of an executive officer or title officer of the Principal; that no title commitment in any amount will be issued if the validity or priority of the estate, lien or interest for which coverage is sought is reasonably subject to question unless the question is first submitted to an executive or title officer of the Principal and the coverage is approved by such officer. The principal may in its discretion reject any application for coverage submitted to it and its decision shall be final.

(c) That during the term of this agreement the Principal may prescribe such conditions and standards respecting examination of titles as it may deem proper and may generally prescribe with respect to its agencies in the State of Washington and the Agent will conform thereto; and that no title commitment shall be issued by the Agent except in such form or forms as may be prescribed by or approved by the Principal.

(d) That the Agent will at all times maintain a complete file and record of all applications for

title commitments and of all title commitments issued, together with a memorandum of all pertinent facts thereunder disclosed to it, and that the Principal, by its representative or by an officer or employee shall at all times have ready access to all such files and records and shall be furnished copies thereof on demand, which access shall continue to be provided after termination of this contract.

(e) That it will at all times keep full and complete books of account and will furnish to the Principal all such financial statements and balance sheets showing the condition of its business as it may make to any official of the State of Washington or of the United States, and will such statements as the Principal from time to time may require to enable the Principal to in addition thereto furnish to the Principal prepare any report required under any state or federal law, and will on demand make available to the Principal such accounts and records as Principal may deem necessary. Should the Principal at any time desire any audit of the books and affairs of agent it may cause the same to be made, at its own expense, by a Certified Public Accountant of its own selection. Principal shall be entitled at all reasonable times to examine the books, records and accounts of Agent pursuant to the terms hereof.

(f) That it will publish no advertisement concerning the said agency or any matter within this agreement, unless first approved by the Principal.

(g) The Agent will not act as agent for or on behalf of any other title insurance company or become interested in or a stockholder of any such other company without consent of Principal.

5. The Agent shall make a charge for each title commitment issued in strict accordance with the sched-

ule of rates of the Principal filed in compliance with the Insurance Code of the State of Washington, and applicable to Cowlitz County. A copy of such schedule and all amendments thereto and all administrative interpretations thereof shall be furnished to the Agent. In case of issuance in the name of the Principal of a title commitment other than title insurance, and for which no charge is established by the filed schedule of rates, the charge shall be such amount as the Principal has established elsewhere for like coverages or services or, if no charge has been so established, in such amount as the Agent may fix with the approval of the Principal.

6. The Principal is expressly authorized to bind the Agent with respect to bids and contracts for title evidence or title services to be furnished to any governmental unit or subdivision on the same terms and conditions as are applicable to the Principal and to other agents or affiliate companies with respect to such bids and contracts; provided, the Agent shall be consulted and its approval obtained before any such bid is filed or contract executed which requires the issuance of guaranteed certificates of title by the Agent at rates below those established for issuance of title insurance commitments in like amounts or which requires performance of services by the Agent at rates below those previously established by the Agent for performance of like services.

7. It is mutually agreed that all services performed and all policies, policy endorsements and reports preliminary to issuance of such policies issued by the Agent under an application which involve examination of title and the exercise of skill and judgment in determining the effect upon title of documents and proceedings, shall be deemed title commitments within the intent of this contract of agency and shall be performed and issued in the name of the Principal. Limited Liability Reports and Reports for Court Proceedings are not deemed

title commitments within the intent of this contract and shall be issued only in the name of the Agent, and the Agent hereby agrees to hold the Principal harmless against any claim or lien arising thereunder. All services performed and all reports and certificates issued, which involve only abstracting or reporting of recorded documents, or legal proceedings, including but not limited to conventional abstracts of title, line abstracts, escrow services, statement of necessary parties to legal proceedings, tract ownership data not involving examination of title and tax registration services shall be performed and issued in the name of the Agent only and shall not be deemed title commitments within the intent of this contract of agency. All charges (including surcharge and special risk premiums) for issuance of a title commitment as herein defined shall be deemed to have been earned hereunder and to be distributable as herein provided.

8. A report (form to be furnished by the Principal) will be submitted to the Principal on or before the 15th of each calendar month accounting for each policy number used during the preceding calendar month. Payment will be made to the Principal on all title commitments issued, computed on the basis of 12½% of the total premiums charged on title commitments, as defined in Paragraph 7, issued as indicated by the report. If a premium is paid in full and no policy is issued the commission shall be reported and paid as though a policy had been issued. A copy of each title policy, and title commitment, as defined in Paragraph 7, will be furnished to the Principal and will accompany the above mentioned report.

9. If for any reason reinsurance is obtained in connection with any title commitment, the cost of premium therefor will be paid by the Agent out of the premium charged for such title commitment and the compensation paid to the Principal under this contract shall be computed upon the difference

between the premium for the policy and the premium or cost of the reinsurance obtained.

10. Any loss arising on any title commitment issued hereunder by Agent, shall be borne

    (a) Entirely by Principal when the loss arises from a decision in writing by the Principal upon a question submitted by the Agent to the Principal, or when the loss arises from a true insurance hazard (forgery, incapacity of parties, etc.) when such hazard was not known to the Agent and could not have been discovered by Agent in the exercise of reasonable diligence and care;

    (b) Entirely by Agent when loss arises from a misstatement of facts submitted to Principal for approval of coverage.

    (c) Seventy-five percent by Principal and twenty-five percent by Agent when the claim of loss is based upon any grounds other than as specified in Paragraphs (a) and (b) hereof, provided that if the loss is occasioned by failure of the Agent to follow the title practices prescribed by the Principal, or failure of the Agent to otherwise perform hereunder, or if the loss is occasioned by a fraudulent or dishonest acts by an officer or employee of the Agent, then the entire loss will be borne by the Agent.

11. The Principal shall have the sole and exclusive authority to adjust any claim of loss made on any title commitment issued by the Agent, and may contest any such claim or may compromise to pay the same or may purchase any outstanding estate or lien from any person claiming adversely to the person insured, at such price and on such terms as it may deem best, and the full amount paid by the Principal as aforesaid, together with all necessary costs and expenses of any litigation in regard thereto, shall be deemed a loss within the intent hereof and be borne on the basis as outlined in Paragraph 10, above.

12. Notwithstanding any provision of this contract, as between Principal and the Insured, the title commitment is the direct obligation of the Principal.

13. Agent shall at all times maintain at its expense, a fidelity bond covering all of its officers and employees in a company and in a form acceptable to Principal in an amount of $50,000.00 and shall furnish a copy thereof to Principal and proof of payment of the premiums therefor.

This contract is executed pursuant to proper corporate resolution, and the agency created by it shall become effective on ———— 1971 at 8:00 a.m.

SECURITY TITLE INSURANCE
COMPANY OF WASHINGTON

By: /s/ W. S. Norton
W. S. NORTON
President

Attest:

/s/ R. E. Bader
R. E. BADER
Vice President
LAND TITLE OF COWLITZ COUNTY, INC.

/s/ Gerry A. Reitsch
GERRY A. REITSCH
President

By: /s/ Robert A. Bauer
ROBERT A. BAUER
Manager

Attest:

/s/ [Illegible]
Secretary

MODIFICATION OF AGENCY CONTRACT

KNOW ALL MEN BY THESE PRESENTS THAT:

WHEREAS, under the provisions of paragraph 4(b) of the Agency Contract effective November 11, 1971 between SECURITY TITLE INSURANCE COMPANY OF WASHINGTON, as principal, and LAND TITLE OF COWLITZ COUNTY, INC., as agent, any title commitment for coverage in excess of $50,000 must be approved by the principal, and

WHEREAS, it has been agreed between said principal and agent that the amount of such commitment requiring approval of the principal shall be changed to provide that commitments in excess of $75,000 shall require such approval,

NOW, THEREFORE, it is hereby agreed that said paragraph 4(b) of said Agency Contract is amended accordingly, to become effective immediately upon the execution of this Modification.

DATED: this 30th day of June, 1972.

SECURITY TITLE INSURANCE
COMPANY OF WASHINGTON

By: /s/ W. S. Norton
W. S. NORTON
President

Attest:

/s/ R. E. Bader
R. E. BADER
Senior Vice President
LAND TITLE OF COWLITZ COUNTY, INC.

By: /s/ Gerry A. Reitsch
GERRY A. REITSCH
President

By: /s/ Robert A. Bauer
ROBERT A. BAUER
Manager

Attest:

/s/ [Illegible]
Secretary

GENERAL COUNSEL'S EXHIBIT 8

[SEAL]

W.L.T.A. Standard Coverage

POLICY OF TITLE INSURANCE

issued by

SAFECO TITLE INSURANCE COMPANY

hereinafter called the Company, a California corporation, for valuable consideration, and subject to the conditions and stipulations of this policy, does hereby insure the person or persons named in item 1 of Schedule A, together with the persons and corporations included in the definition of "the insured"as set forth in the conditions and stipulations, against loss or damage sustained by reason of:

1. Title to the estate, lien or interest defined in items 3 and 4 of Schedule A being vested, at the date hereof, otherwise than as stated in item 2 of Schedule A; or
2. Any defect in, or lien or encumbance on, said title existing at the date hereof, not shown in Schedule B; or
3. Any defect in the execution of any instrument shown in item 3 of Schedule A, or priority, at the date hereof, over any such instrument, or any lien or encumbrance not shown in Schedule B;

provided, however, the Company shall not be liable for any loss, damage or expense resulting from the refusal of any person to enter into, or perform, any contract respecting the estate, lien or interest insured.

The total liability is limited to the amount shown in Schedule A, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder.

In Witness Whereof, SAFECO Title Insurance Company has caused its corporate name and seal to be hereunto affixed by its duly authorized officers on the date shown in Schedule A.

[SEAL]

/s/ Bruce M. Jones
Secretary

/s/ W. H. Little
President

CONDITIONS AND STIPULATIONS

1. The Company shall have the right to, and will, at its own expense, defend the insured with respect to all demands and legal proceedings founded upon a claim of title, encumbrance or defect which existed or is claimed to have existed prior to the date hereof and is not set forth or excepted herein; reserving, however, the option at any time of settling the claim or paying the amount of this policy in full. In case any such demand shall be asserted or any such legal proceedings shall be instituted the insured shall at once give notice thereof in writing to the Company at its home office and, if the insured is a party to such legal proceedings, secure to the Company, within ten days after service of first process upon the insured, the right to defend such legal proceedings in the name of the insured so far as necessary to protect the insured, and the insured shall render all reasonable assistance in such defense. If such notice shall not be given, or the right to defend secured, as above provided, then all liability of the Company with regard to the subject matter of such demand or legal proceedings, and any expense incident thereto, shall terminate; provided, however, that failure to give such notice shall in no case prejudice the claim or the insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice.

2. In the event of final judicial determination by a court of competent jurisdiction, under which the estate, lien or interest insured is defeated or impaired by reason of any adverse interest, lien or encumbrance not set forth or excepted herein, claim may be made as herein provided. A statement in writing of any loss or damage, for which it is claimed the Company is liable, shall be furnished to the Company at its home office within sixty days after such loss or damage shall have been ascertained. No right of action shall accrue with respect thereto until thirty days after such statement shall have been furnished and no recovery shall be had unless an action shall have been commenced thereon within one year after the expiration of said thirty days. Any rights or defenses of the Company against a named insured shall be equally

available against any person or corporation who shall become an insured hereunder as successor of such named insured.

3. The Company may at any time pay this policy in full, whereupon all liability of the Company shall terminate. Every payment made by the Company, exclusive of costs incurred by the Company as an incident to defense or settlement of claims hereunder, shall reduce the liability of the Company by the amount paid. The liability of the Company shall in no case exceed the actual loss of the insured and costs which the Company is obligated to pay. When the Company shall have paid a claim hereunder it shall be subrogated to all rights and remedies which the insured may have against any person or property with respect to such claim, or would have if this policy had not been issued, and the insured shall transfer all such rights to the Company. If the payment made by the Company does not cover the loss of the insured, such subrogation shall be proportionate. Whenever the Company shall be obligated to pay a claim under the terms of this policy by reason of a defect in the title to a portion of the area described herein, liability shall be limited to the proportion of the face amount of this policy which the value of the defective portion bears to the value of the whole at the time of the discovery of the defect, unless liability is otherwise specifically segregated herein. If this policy insures the lien of a mortgage, and claim is made hereunder, the Company may pay the entire indebtedness and thereupon the insured shall assign to the Company the mortgage and the indebtedness secured thereby, with all instruments evidencing or securing the same, and shall convey to the Company any property acquired in full or partial satisfaction of the indebtedness, and all liability of the Company shall thereupon terminate. If a policy insuring the lien of a mortgage is issued simultaneously with this policy and for simultaneous issue premium as provided in rate schedule, any payment by the Company on said mortgage policy with respect to the real estate described in Schedule A hereof shall reduce pro tanto the liability under this policy. All actions or proceedings against the Company must be based on the

provisions of this policy. Any other action or actions or rights of action that the insured may have or may bring against the Company with respect to services rendered in connection with the issuance of this policy, are merged herein and shall be enforceable only under the terms, conditions and limitations of this policy.

4. The following terms when used in this policy mean: (a) "named insured": the persons and corporations named as insured in Schedule A of this policy; (b) "the insured": such named insured together with (1) each successor in ownership of any indebtedness secured by any mortgage shown in Item 3 of Schedule A, (2) any owner or successor in ownership of any such indebtedness who acquires title to the real estate described in Item 4 of Schedule A, or any part thereof, by lawful means in satisfaction of said indebtedness or any part thereof, (3) any governmental agency or instrumentality which insures or guarantees said indebtedness or any part thereof, and (4) any person or corporation deriving an estate or interest in said real estate as an heir or devisee of a named insured or by reason of the dissolution, merger, or consolidation of a corporate named insured; (c) "date hereof": the exact day, hour and minute specified in Schedule A; (d) "public records": records which, under the recording laws, impart constructive notice with respect to said real estate; (e) "home office": the office of the Company at the address shown herein; (f) "mortgage": mortgage, deed of trust, trust deed, or other security instrument described in Schedule A.

SAFECO TITLE
INSURANCE COMPANY

POLICY OF TITLE INSURANCE

[SEAL]

SAFECO TITLE
INSURANCE COMPANY

Washington State
Head Office
1109 Second Avenue
Seattle, Washington 98101

[SEAL]

[SEAL]

Important

Papers—

This Title Policy is one of the most important documents included in your record of ownership or interest in the property described herein. In the future you may have occasion to refer to it for purposes of sale, transfer, or refinance. We suggest it be kept by you in a safe and permanent place so it may be readily available to expedite your transaction.

SAFECO TITLE INSURANCE COMPANY
A member of the SAFECO Group

SAFECO TITLE
INSURANCE COMPANY

SCHEDULE A

Effective
Date:

Policy No.:

Amount of liabiilty: $
Premium: $

1. INSURED

2. TITLE TO THE ESTATE, LIEN OR INTEREST INSURED BY THIS POLICY IS VESTED IN

3. ESATE, LIEN OR INTEREST INSURED

4. DESCRIPTION OF THE REAL ESTATE WITH RESPECT TO WHICH THIS POLICY IS ISSUED

SCHEDULE B

DEFECTS, LIENS, ENCUMBRANCES AND OTHER MATTERS AGAINST WHICH THE COMPANY DOES NOT INSURE:

GENERAL EXCEPTIONS

1. Encroachments or questions of location, boundary and area, which an accurate survey may disclose; public or private easements, streets, roads, alleys or highways, unless disclosed of record by recorded Plat or conveyance, or decree of a Court of record; rights or claims of persons in possession, or claiming to be in possession, not disclosed by the public records; material or labor liens or liens under the Workmen's Compensation Act not disclosed by the public records; water rights or matters relating thereto; any service, installation or construction charges for sewer, water, electricity, or garbage removal.
2. Exceptions and reservations in United States Patents; right of use, control or regulation by the United States of America in the exercise of powers over navigation; limitation by law or governmental regulation with respect to subdivision, use, enjoyment or occupancy; any prohibition or limitation on the use, occupancy or improvement of the land resulting from the rights of the public or riparian owners to use any waters which may cover the land; defects, liens, encumbrances, or other matters created or suffered by the insured; rights or claims based upon instruments or upon facts not disclosed by the public records but of which rights, claims, instruments or facts the insured has knowledge.
3. General taxes not now payable; matters relating to special assessments and special levies, if any, preceding the same becoming a lien.
4. "Consumer credit protection," "truth-in-lending," or similar law, or the failure to comply with said law or laws.

SPECIAL EXCEPTIONS

Please!! **BOYCOTT SAFECO INSURANCE**

Your premium $ are being used to prolong our strike. Will you please support us in our effort to earn a decent standard of living? If you have policies with the following Safeco Group Companies, please cancel — we need your support:

SAFECO LIFE INSURANCE COMPANY
SAFECO INSURANCE COMPANY OF AMERICA
GENERAL INSURANCE COMPANY OF AMERICA
FIRST NATIONAL INSURANCE COMPANY OF AMERICA

Contact your agent to change your policy, without any loss of coverage.

Safeco sells insurance but refuses their own employees company paid benefits (dental, medical & vision). Their best offer to date includes a starting rate as low as $2.39 per hour, no cost-of-living clause or union security clause. Will you please help us? Thank you.

THE STRIKING EMPLOYEES OF THE SAFECO TITLE INSURANCE COMPANY
Represented by:
RETAIL STORE EMPLOYEES UNION LOCAL 1001, AFL-CIO Insurance Division

GENERAL COUNSEL'S EXHIBIT 9

Tacoma, Wash.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 19-CC-760

RETAIL STORE EMPLOYEES UNION LOCAL NO. 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

and

Case 19-CC-777

LAND TITLE CO. OF PIERCE COUNTY

and

SAFECO TITLE INSURANCE COMPANY

ORDER APPROVING STIPULATION

and

TRANSFERRING PROCEEDING TO THE BOARD

On September 11, 1975, Retail Store Employees Union Local No. 1001, Retail Clerks International Association, AFL-CIO; Land Title Co. of Pierce County; Safeco Title Insurance Company; and the General Counsel of the National Labor Relations Board entered into a Stipulation of Facts for Submission to the Board in the above-entitled proceeding. The parties agreed that the Charges, Consolidated Complaint, Answer, the Stipulation of Facts and exhibits attached thereto, shall constitute the entire record in the case and that no oral testimony is necessary or desired by any of the parties. They waived a hearing, the making of findings of fact and conclusions of law,

and the issuance of a decision by an Administrative Law Judge, and submitted the case for findings of fact and conclusions of law and an order directly to the Board. The parties requested that the Board set a time for the filing of briefs.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Stipulation be, and it hereby is, approved and made a part of the record herein.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board in Washington, D.C., for the purpose of making findings of fact and conclusions of law, and for the issuance of a Decision and Order,

The parties herein may file briefs with the Board in Washington, D.C., on or before October 15, 1975.

Dated, Washington, D.C., October 1, 1975.

By direction of the Board:

JOHN C. TRUESDALE
Executive Secretary

SUPREME COURT OF THE UNITED STATES

No. 79-672

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, ETC.

ORDER ALLOWING CERTIORARI

Filed January 7, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 313620 227

Supreme Court, U.S.
FILED
DEC 8 1979
MICHAEL RODAK, JR., CLERK

No. 79-672

Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

The petition for a writ of certiorari sets out the opinions below, the basis of this Court's jurisdiction, the statute involved and a statement of the case in a sufficiently clear and concise fashion to make a counterstatement of these matters unnecessary. (See Pet. 1-6.)

COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether, under the rule stated in *Labor Board* v. *Fruit Packers,* 377 U.S. 58 (*Tree Fruits*) explicating § 8(b)(4) of the National Labor Relations Act, unions may lawfully engage in peaceful consumer picketing confined to a struck product wherever the product is sold, or whether unions may engage in such picketing only if the struck product does not constitute a predominant portion of the seller's business?

REASONS FOR DENYING THE WRIT

The National Labor Relations Board's petition carefully traces Rule 19 of this Court's Rules. The Board asserts that the Rule's criteria are satisfied in that the issue presented here has, in a previous case, been determined by this Court to warrant review, is a frequent subject of litigation, has resulted in a conflict in the circuits, and was resolved below to require a result Congress meant to avoid. Not one of these claims has merit. The petition is all form and no substance and should therefore be denied.

1(a). The Board concludes its petition by succinctly restating its dominant theme: "This Court recognized the need to resolve the issue [presented here] in granting certiorari in [*NLRB* v. *Local 14055 Steelworkers*, 429 U.S. 807 (*Dow Chemical*) which also presented that issue] and the same considerations warrant granting review here." (Pet. 12; see also *id.* at 6-7.) But the sole order entered in *Dow* reads in its entirety: "Certiorari granted, judgment vacated, and cases remanded with directions to remand to the National Labor Relations Board for reconsideration in light of intervening circumstances." (429 U.S. 807.) [1] (The "intervening circumstance" was the dissolution of the respondent union; on remand the circumstance was determined to moot the case. (See *Local 14055 Steelworkers (Dow Chemical Co.)*, 229 NLRB 302.) And the Board's reading of that order as "recogniz[ing] the need to resolve the issue" also presented here is wholly unwarranted.

[1] Thus, the statement at Pet. 6, n. 6 that "the Court, *after* granting certiorari in *Dow Chemical*, remanded the case for reconsideration*** " (emphasis supplied) is inaccurate.

By granting certiorari and simultaneously vacating the judgment below, the Court did not provide for resolution of the issue concerning the proper understanding of *Tree Fruits* presented by the Board and by the employers who petitioned for certiorari to review the *Dow* judgment, but provided only for resolution of the mootness issue raised by the respondent union. Indeed, in *Dow* the Board proposed that certiorari should be granted to decide the § 8(b)(4) issue and that "questions concerning the ongoing de facto existence of the Union should [thereafter] be resolved at the compliance stage of this case" (*Dow* Pet. 14),[2] and only in the alternative that certiorari should be granted and the matter remanded for consideration of the mootness issue. The Court, of course, chose the second of these alternatives.

(b) It is self-defeating for the Board to suggest "Nothing has occurred since the grant of certiorari in *Dow Chemical* to diminish the need for final resolution of the [§ 8(b)(4)] issue." (Pet. 6-7.) While it is true that next to nothing in the way of litigation has since occurred, that is a ground for denying the petition rather than for granting it.

In *Dow*, the Board represented that "The issue has now reached the courts of appeals in several cases, and it recurs frequently before the Board." (*Dow* Pet. 14.) This assertion is repeated *in haec verba* at p. 12 of the Board's present petition. The *Dow* petition (at p. 14, n.7) also listed six cases in which the Board's *Dow* decision had "been the basis, in whole or in part, for the issuance of unfair labor practice complaints." There is no similar support for the

[2] Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit in No. 75-1858.

Board's present petition.

The facts are: this is the *only* case since *Dow* in which any court of appeals has decided the issue raised in the petition; only two of the cases noted in *Dow* ever reached the Board and both were decided without reaching the present issue;[3] and, as far as we are aware, there is at present only one case before the Board in which a complaint has been issued on the *Dow* theory.[4]

Unless the Board's *ipse dixit* is sufficient to establish that an issue "recurs frequently" and thus warrants this Court's attention, that criterion of this Court's Rule 19 has plainly not been satisfied.

2. There is likewise no merit to the contention that "the decision below conflicts with *American Bread* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969)." (Pet. 10.) In *American Bread* the union, which was on strike against a bakery, was held to violate the Act by picketing restaurants which served bread as part of their meals, but did not sell bread separately. The Board argues that "the Sixth Circuit there stressed the probable result of the union's activity—'a boycott on all

[3] The two cases which were subsequently decided by the Board are *Millmen-Cabinet Makers Union Local 550, etc.*, 227 NLRB 196 and *Local 248 Meat and Allied Food Workers*, 230 NLRB 189. In the first of these the Board majority, though finding a violation, expressly disclaimed reliance on *Dow* (227 NLRB at 196, n. 1) and a dissenting member (who had been in the majority in *Dow*) concluded that the picketing was lawful under *Tree Fruits*. In the latter case, the majority did not mention *Dow* but held that the picketing did not adequately identify the struck product to satisfy *Tree Fruits* (230 NLRB at 189, n.2.)

[4] *Local 456 Teamsters and Chauffeurs, etc. (Carvel Corp.)*, 2-CC-1541. The Board obtained an injunction against the picketing pursuant to § 10(l) of the Act in *Bennett* v. *Teamsters Local 456*, etc., 459 F. Supp. 223, (S.D.N.Y.), discussed at p. 7, n. 6, *infra*.

the meals served in the establishments' (411 F.2d at 154)—rather than the threshold inability of potential customers to order bread-free meals." (Pet. 11.)[5]

But, as the Sixth Circuit said: "American Bread's output was integrated into the meals served by the restaurants and could not readily be recognized by the customers as to particular brand. In order for customers to express sympathy for the Teamsters' cause, they would necessarily have to refrain from ordering any meal served with bread or bakery products." (411 F.2d at 154.) And, that court stressed the struck product's integration into the restaurant's overall product by mentioning that point four times in the course of the two paragraphs of its opinion addressed to the meaning of *Tree Fruits*. (See 411 F.2d at 154.) One of these is the Sixth Circuit's statement of the Board's position, and another is that court's approving description of the holding in *Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952 (C.A.D.C.). By thus following *Honolulu Typographical Union*, the *American Bread* court could not have considered that it was commiting the Sixth Circuit with respect to cases, like the present, which do not involve the struck product's integration into another. For, the *Honolulu Typographical* court had cautioned: "We need not decide in this case, nor do we intimate a view on, the question whether a secondary seller who sells only the struck primary product may be picketed even though the appeal necessarily amounts to a request that consumers cease all patronage." (401 F.2d at 956, n. 9.)

[5] The same contention was phrased more circumspectly in the Board's *Dow* petition (at p. 12): "The Sixth Circuit *seemed most influenced by* the probable result of the union's activity***" (emphasis added).

By the same token, the Board's further contention that the rationale of *Honolulu Typographical Union* "is inconsistent with the decision below" (Pet. 11, n. 9), and the Agency's even more ambitious claim that "the Board's holding follows *a fortiori* from that in *American Bread*" (Pet. 11), attribute to the late Judge Leventhal, who wrote *Honolulu Typographical,* and who joined the opinion for the court below in this case, an uncharacteristic inability to grasp the logic of his own reasoning. For ourselves, we cannot improve upon Judge Robinson's demonstration of the "ready" distinction between this case on the one hand and *Honolulu Typographical* and *American Bread* on the other:

> There is a decisionally-significant difference between a secondary employer's sales of a struck product in the form in which it leaves the primary employer, and sales by the secondary employer of goods or services into which the struck product has been so integrated as to lose its separate identity for all practical purposes. In the former situation, the primary employer and the secondary retailer cater to the same body of eventual consumers; the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory. When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the primary employer and the secondary retailer no longer deal in the same product and share a common market. The struck product no longer has a market of its own, and it cannot be pursued into the market for the merged product without implicating its other components. The stark fact of the matter is that a discrete consumer boycott of the struck product, given its newly-acquired character, is simply not possible. See [137 U.S. App. D.C.] at 4, 401 F.2d at 955.

The decided cases vividly illustrate the contrast. In *Honolulu Typographical,* restaurant customers acceding to the union's supplication would have had to boycott meals—products, of course, not supplied by the primary employer, the newspaper. Similarly, in *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969), in order to boycott a struck product—bread—customers of picketed restaurants would have had to pass up meals that included bread, thus effectively spreading the boycott to products not encompassed by the dispute with the primary employer. In the case at bar, however, consumers were neither required nor requested to boycott any neutral product in order to honor the picketers' appeal. Neutral secondary employers are legally susceptible to consumer picketing under *Tree Fruits,* but only insofar as the boycott of the struck product does not spill over into other phrases of the secondary enterprise. In true merged-product cases, however, the notion that the struck product is being followed to the consumer becomes so tenuous as to lose touch with reality. *Honolulu Typographical Union 37* v. *NLRB, supra* note 70, 131 U.S. App. D.C. at 4. 401 F.2d at 955. [Pet. 31a-32a, n. 93.] [6]

[6] So too, in *Teamsters Local 456, supra* (p. 4, n. 4, *supra*) the District Court in granting an injunction against consumer picketing because of its understanding that (10(l) limited its role to determining whether there is "some significant possibility that the picketing here did violate the Act" did not decide whether the Board or the Court of Appeals had been correct in *Dow Chemical.* That court did, however, expressly "reject the Board's contention that Carvel's [the primary employer's] products are so 'merged' with the products of other suppliers that the picketing here could

3(a). The petition (at p. 8) asserts that "*Tree Fruits* did not hold, as the court below implies, that struck product picketing can never transgress Section 8(b)(4)(ii)(B)." The court below did not so "impl[y]." That court, consistent with *Tree Fruits,* made it plain that picketing urging consumers not to buy any of the products sold by a retailer because that retailer sells a struck product does transgress the Act. (Pet. 25a-28a.) What the Court of Appeals did hold, again consistent with *Tree Fruits,* is that picketing addressed to consumers which is confined to urging them not to buy a struck product which is separately offered for sale does not transgress § 8(b)(4) simply because the establishment at which the picketing takes place deals predominantly in the product of the struck employer. As that court explained:

> In *Tree Fruits,* *** in order to determine whether picketing "threaten[s], coerce[s], or restrain[s]" [within the meaning of § 8(b)(4)(ii)(B)] the critical inquiry the Court undertook, simply and solely, was whether the "picketing is employed only to persuade customers not to buy the struck product." [377 U.S. at 72.] That was because, in that event, "the union's appeal is closely confined to the primary dispute," [*id.*] and while the picketing is extended to the secondary employer's premises, if the union's effort is successful the secondary employer's purchases from the primary employer "are decreased only because the public has diminished its purchases of the struck product." [*id.*]

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not be confined to the struck product as was the picketing in Tree Fruits" and on that basis stated the case to be "unlike *American Bread Company* v. *NLRB* (6th Cir. 1969) 411 F.2d 147." (See 459 F. Supp. at 231, n. 17.)

In this rationale we can perceive clearly enough the line of demarcation between what Section 8(b)(4)(ii)(B) leaves unaffected and what it plainly forbids—the line distinguishing "between picketing a secondary employer merely to 'follow the struck goods,' and picketing designed to res ult in a generalized loss of patronage . . . ." [*id* at 64 n. 7.] When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary and secondary employers is simply a reflection of the consuming public's reaction to the union's limited appeal, geographically extended as it was from the primary to the secondary site. But when the picketing is utilized to induce customers to foresake the secondary employer completely he "stops buying the struck product," the *Tree Fruits* Court reminds, "not because of a falling demand, but in response to pressure designed to inflict injury on his business generally." [*Id.* at 72.] As *Tree Fruits* declares, "[p]eaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." [*Id.* at 70.] In, the latter case, unlike the former, the union "does more than merely follow the struck product; it creates a separate dispute with the secondary employer." [*Id.* at 72.]

The test of "threaten[ing], coerc[ing], or restrain[ing]" which we thus distill from *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor, or whether the picketing projects its force beyond these boundaries. [Pet. 24a-26a; footnotes omitted.][7]

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[7] In its response to the Court of Appeals' reasoning, the Board

(b) The Board's petition criticizes the Court of Appeals for establishing a "per se approach" whereas, according to the Board, *Tree Fruits* "call[s] for a careful weighing by the Board of disputed factual contentions" (Pet. 8-9). Since the Board, in its decisions and in its argument here posits a violation whenever picketing confined to the struck product occurs in a situation in which the struck product constitutes a substantial proportion of the retailer's business, *without regard to any of the other facts,* this characterization of the Board's legal theory is misleading. The further remark that "the approach of the court below would simplify that inquiry by focusing it solely on the language of the picket signs" (Pet. 9) is simply wrong.

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says that the lower court's "rationale fails to recognize that there are circumstances *** where the picketing, though confined to the struck product, would nonetheless have the prohibited effect of 'induc[ing] customers to foresake the secondary employer completely.' " (Pet. 8, n. 7.) But the Board cites nothing in *Tree Fruits* or anywhere else for the proposition that such an "effect" is "prohibited." And the well-settled law is that § 8(b)(4) does not interdict otherwise lawful picketing because of its effects:

> Section 8(b)(4)(B) is *** the product of legislative compromise and *** reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute. This primary activity is protected even though it may seriously affect neutral third parties. *Steelworkers* (Carrier Corp.) v. *NLRB,* 376 U.S. 492, 502 (1964); *Electrical Workers* (General Electric) v. *NLRB,* 366 U.S. 667, 673 (1961).
>
> • • •
>
> Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected. *Steelworkers* (Carrier), 376 U.S., at 496; *Electrical Workers* (General Electric), 366 U.S., at 682. [*NLRB* v. *Operating Engineers,* 400 U.S. 297, 303-304.]

There is not a word in that court's opinion which protects a union where the evidence is that, notwithstanding the language of the picket sign, the union was urging a boycott which extended beyond the struck product, for example, by orally urging the customers not to buy other products. More fundamentally, the approach which the Board urges here is that which has been taken in *Tree Fruits* by the Court of Appeals and which this Court *disapproved.* This is a point which Judge Robinson thought "bears repeating" (Pet. 30a), but which the petition ignores:

> The Board rested its *** conclusion solely on the proposition "that a successful boycott of Safeco insurance policies would predictably involve a virtual complete boycott of the land title companies." That, by the Board's estimate, was enough to transform the picketing into "coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act." Our colleagues in dissent contend similarly that the financial consequences posed for the companies were alone sufficient to trigger the statutory picketing. We think these positions are totally at war with *Tree Fruits.*

The Court's test for coercion, as we have delineated, essentially is whether secondary consumer picketing strikes a blow only at the primary employer's ultimate market for the struck product, and not otherwise at the secondary employer's business. Neither the potential nor the predictable economic consequences for the secondary entrepreneur is the key, nor even a factor in the equation. The *Tree Fruits* Court's reasoning would seem to make that conclusion evident, and other considerations serve to drive it firmly home. In no wise was the *Tree Fruits* decision pitched on the

degree of financial impact, though the dissenting members of the Court called attention to the milieu we face today. It bears repeating that the *Tree Fruits* majority disagreed with the earlier view of this court "that the test of 'to threaten, coerce or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss." [377 U.S. at 72.] We find it difficult to imagine a more explicit rejection of the economic-impact theory of prohibited coercion.

In urging that the foreseeable economic consequences of the union's effort converted an appeal directed solely to the struck product into a prohibited call for a full boycott of the secondary employers' business, the Board and the dissent alike embrace the concept of coercion that *Tree Fruits* consigned to the graveyard. [Pet. 28a-30a; footnotes omitted.]

Thus, the "careful weighing by the Board of disputed factual contentions" (Pet. 8-9) must be addressed not to whether the retailer suffered economic injury because of the consumer picketing, but to whether the picketing is in fact strictly confined to persuading customers not to purchase the struck product.

CONCLUSION

Experience has shown that the issue raised by the petition arises infrequently. The decision below is not in conflict with that of any other court of appeals. And that decision accords with the governing precedent in this Court, which the court below examined with scrupulous care. In contrast, as that court observed, the Board proffers only an economic impact test which this Court has squarely re-

jected. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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No. 79-672

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-44a) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 47a-66a) are reported at 226 N.L.R.B. 754.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on June 29, 1979. On September 14, 1979, the Chief Justice extended the time in which to file a petition for a writ of certiorari to October 27, 1979. The petition was filed on October 24, 1979, and was granted on January 7, 1980 (A. 47). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral retailer, directed at the product of a firm with which the union has a dispute, is prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the retailer's customers to cease dealing with it altogether.

STATUTE INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. 158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * * * *

> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing: * * * *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;
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> * * * * *

STATEMENT

A. The Facts

The facts were stipulated by the parties (A. 13-22). Respondent, the certified bargaining representative of certain employees of Safeco Title Insurance Company, called a strike following an impasse in negotiations for an initial contract (Pet. App. 50a; A. 14).

In addition to picketing Safeco's office, striking employees also engaged in picketing and handbilling outside the offices of five land title companies that sell only Safeco title insurance policies (Pet. App. 50a-51a; A. 15-20).[1]

The signs carried by the strikers stated (Pet. App. 50a-51a; A. 15-20):

> SAFECO NONUNION DOES NOT EMPLOY MEMBERS OF OR HAVE CONTRACT WITH RETAIL STORE EMPLOYEES LOCAL 1001

The strikers also distributed handbills to the general public requesting policyholders to support the strike by cancelling their insurance policies with designated "Safeco Group Companies" (Pet. App. 51a; A. 21, 43).[2] The Union's activities at the land title companies did not cause any work stoppages or interference with deliveries (Pet. App. 51a; A. 15-20).

From 90 to 95 percent of the income of the land title companies is derived from the issuance of Safeco title insurance policies; the remaining 5 to 10 percent, from title research and escrow services (Pet. App. 51a; A. 15-20). Each land title company operates under an agency contract with Safeco, under which Safeco underwrites all title insurance issued by it and

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[1] The picketed companies were Land Title Co. of Pierce County, Land Title Co. of Snohomish County, Land Title Co. of Kitsap County, Land Title Co. of Cowlitz County, and Land Title Co. of Clark County (A. 15-20).

[2] These companies were identified as Safeco Life Insurance Company, Safeco Insurance Company of America, General Insurance Company of America, and First National Insurance Company of America (A. 43).

the land title company agrees not to act as agent for any other title insurance company without Safeco's consent (A. 15-20, 25, 28, 32).[3] The land title companies do not have authority to issue title insurance policies in their own name (A. 21).

Safeco owns stock in all of the land title companies: 53 percent in one company and amounts ranging from 12 to 38 percent in the other four (Pet. App. 51a-52a; A. 15-20). The remaining stock is held by various individuals (Pet. App. 52a; A. 15-20). An officer of Safeco serves as an officer and member of the board of directors of each land title company (Pet. App. 52a; A. 15-20).[4]

Each land title company independently establishes its employees' wages, hours and other terms and conditions of employment. All employees of each land title company perform their work in the local area of their company and there is no interchange of employees between Safeco and the land title companies. (Pet. App. 51a-52a; A. 15-20.)

B. The Board's Decision and Order

The Board concluded that the land title companies were neutrals in the dispute between Safeco and the Union, rather than "allies" of Safeco (Pet. App. 54a-

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[3] All the agency contracts are substantially identical to the one reproduced at A. 25-32.

[4] Land Title Co. of Clark County, the land title company in which Safeco is a majority shareholder, has two Safeco officers on its board of directors (Pet. App. 52a n.4; A. 20).

58a). The Board then considered the applicability of *NLRB* v. *Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*"Tree Fruits"*), where this Court ruled that Section 8(b)(4)(ii)(B) permits a union to engage in consumer picketing at the site of a secondary employer "directed only at the struck product," but outlaws "a union appeal to the public at the secondary site not to trade at all with the secondary employer" (377 U.S. at 63). Relying on its decision in *Local 14055, United Steelworkers of America, AFL-CIO*, 211 N.L.R.B. 649 (1974) (*"Dow Chemical"*), which involved a similar situation, the Board concluded that, although the Union's secondary-site picketing was limited to Safeco's products, it violated Section 8(b)(4)(ii)(B) because it was "reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a-59a). Since almost the entire business of the companies was devoted to the sale of Safeco insurance policies, the picketing, if successful, "would predictably involve a virtually complete boycott of the land title companies. * * * The land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business" (Pet. App. 59a). The Board ordered the Union to cease its unlawful conduct (Pet. App. 61a).[5]

[5] Two members of the Board dissented on the ground that the picketing was lawful since it was directed only at the struck product and because, in any event, the land title companies were not "neutral employers" (Pet. App. 63a-65a).

C. The Decision of the Court of Appeals

The court of appeals, sitting en banc and dividing 5 to 4, denied enforcement of the Board's order (Pet. App. 1a-44a).[6]

The court upheld the Board's finding that the land title companies were neutrals in the Union's dispute with Safeco (Pet. App. 6a-11a). Following its earlier decision in *Dow Chemical*,[7] however, the court held that because the picketing was limited to the struck product the foreseeable economic consequences to the neutrals were not a sufficient basis for finding that the picketing "threaten[ed], coerce[d], or restrain[ed]" the neutrals within the meaning of Section 8(b)(4)(ii)(B) of the Act (Pet. App. 26a-32a).

The dissenting judges agreed with the Board that *Tree Fruits* does not protect picketing of a neutral retailer where the intended or foreseeable effect of the picketing is to persuade the retailer's customers to cease dealing with it altogether (Pet. App. 35a-44a).

SUMMARY OF ARGUMENT

Although this Court in *Tree Fruits* held that peaceful picketing at a retail store urging consumers not to purchase the product of an employer with whom

[6] The decision of a divided panel of the court, 99 L.R.R.M. 3330 (1978), which had upheld the Board's decision, was vacated when the case was set down for en banc consideration.

[7] *Local 14055, United Steelworkers of America* v. *NLRB*, 524 F.2d 853 (D.C. Cir. 1975), denying enforcement of 211 N.L.R.B. 649 (1974), judgment vacated and remanded for reconsideration in light of intervening circumstances, 429 U.S. 807 (1976), complaint dismissed because of mootness, 229 N.L.R.B. 302 (1977).

the union had a primary dispute did not constitute a threat, coercion, or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act, it did so in a context where it was clear that the object of the picketing was not to cut off all trade with the neutral store. The picketing in *Tree Fruits* was addressed to only one of numerous products sold by the neutral store, and the Court emphasized that, if the union's "appeal succeed[ed], the secondary employer's purchases from the struck firms [would be] decreased only because the public ha[d] diminished its purchases of the struck product" (377 U.S. at 72). The Court contrasted that situation with "consumer picketing" that "is employed to persuade customers not to trade at all with the secondary employer" and is "designed to inflict injury on his business generally" (*ibid.*). The latter type picketing, the Court held, would "threaten, coerce, or restrain" the secondary employer and thus would violate Section 8(b)(4)(ii)(B) of the Act.

In the present case, no clear distinction can be made between picketing that is limited to persuading customers not to buy the struck product and picketing aimed at the secondary's patronage generally. Here, the picketed product constitutes such a large portion of the neutral's business that the picketing, if successful, would necessarily result in a boycott of the neutral's total business. In these circumstances, the Board properly determined that the Union's picketing was unlawful because it was "reasonably calculated

to induce customers not to patronize the neutral parties at all" (Pet. App. 58a).

Contrary to the view of the court below, *Tree Fruits* does not hold that, so long as picketing is directed at the struck product, it is lawful regardless of its intended or foreseeable effect on the neutral's total business. Rather, the Court left it to the Board to determine in each case, subject to judicial review, whether the union's picketing manifests an intent "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). Picketing with such an object is unlawful, whether or not it is limited in terms to a struck product.

This view is supported by the legislative history of Section 8(b)(4)(ii), which shows, as *Tree Fruits* recognizes, that Congress intended to proscribe the use of consumer picketing at secondary sites "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). Further support is provided by the "merged product" cases, in which the Board has held, with uniform court approval, that product picketing at neutral sites is outlawed where the product of the primary employer has become so integrated with that of the neutral that the picketing amounts to an appeal to stop trading with the neutral altogether. The impact of picketing as pressure for a total boycott of the neutral is the same whether it is achieved because the primary employer's product has

merged into that of the neutral or because virtually all of the neutral's business consists of selling that product.

There is no merit to the suggestion of the court below (Pet. App. 34a-35a) that prohibition of the Union's picketing here would raise a substantial constitutional question. As *Tree Fruits* recognizes, although "a broad ban against peaceful picketing" might be unconstitutional, it was proper for Congress to deal with the "isolated evil" of "peaceful consumer picketing at secondary sites * * * to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). Read "as barring only picketing urging [a] total consumer boycott, * * * the statute strikes narrowly at those 'inherently compulsive features' present when consumers must cross a line" (Pet. App. 40a n.1 (dissenting opinion)). The narrowness of that prohibition here is emphasized by the publicity proviso to Section 8(b)(4), under which the Union was free to advise the public of its dispute with Safeco through distributing handbills at the secondary sites, or by any other form of publicity other than picketing.

ARGUMENT

I. THE BOARD PROPERLY CONCLUDED THAT CONSUMER PICKETING BY A LABOR UNION AT THE PREMISES OF A NEUTRAL RETAILER VIOLATES SECTION 8(b)(4)(ii)(B) OF THE NATIONAL LABOR RELATIONS ACT WHEN, THOUGH IT IS DIRECTED AT THE PRODUCT OF THE FIRM WITH WHICH THE UNION HAS A DISPUTE, THE PREDICTABLE RESULT OF THE PICKETING, IF SUCCESSFUL, WILL BE TO PERSUADE THE RETAILER'S CUSTOMERS TO CEASE DEALING WITH IT ALTOGETHER

A. Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person" with the object of forcing or requiring that person to "cease doing business with any other person." The Board found, and the court of appeals agreed, that the title companies were neutrals in the Union's dispute with Safeco (*supra*, pages 5-6, 7),[8] and that the object of the Union's picketing at the companies' premises was to put pressure on the companies to cease doing business with Safeco, with whom the Union had its primary dispute. Accordingly, the sole question is whether the means utilized by the Union to exert its pressure on the title companies—i.e., consumer picketing directed at the product of the firm with which the Union has its dispute—is the type of threat, coercion, or restraint which Congress intended to proscribe under subparagraph (ii) of Section 8(b)(4). The answer to this

[8] That finding is not in issue here. In any event, the finding is clearly correct for the reasons stated by the Board and the court of appeals (Pet. App. 6a-11a, 54a-58a).

question turns on application of the principles enunciated by this Court in *Tree Fruits, supra.*

The union in *Tree Fruits* picketed neutral Safeway stores to persuade Safeway's customers to boycott apples in support of the union's primary dispute with apple packers and distributors (377 U.S. at 59-61). Rejecting the Board's ruling that all such secondary picketing was illegal *per se* (132 N.L.R.B. 1172 (1961)), the Court determined that in enacting Section 8(b)(4)(ii)(B) Congress had meant to outlaw peaceful consumer picketing at secondary sites when that picketing was employed "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63), but Congress did not intend to outlaw such picketing which, as in the case before it, "only persuades [the neutral's] customers not to buy the struck product" (377 U.S. at 70). The Court explained (377 U.S. at 72):

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [Footnote omitted.]

The facts of *Tree Fruits* permitted a clear distinction between picketing limited to persuading customers not to buy the struck product and picketing aimed at the secondary's patronage generally. Apples occupy but a small portion of Safeway's retail shelves, and the union could urge Safeway's customers to refrain from buying them without asking that they cease trading with Safeway altogether. *Tree Fruits* did not deal with a situation where, as here, such a sharp distinction cannot be made—*i.e.*, where, although the picketing is directed at the struck product, that product constitutes such a large portion of the neutral's business, or has become so integrated in that business, that the picketing, if successful, would necessarily result in a boycott of the neutral's total business. In such a situation, it is for the Board, subject to judicial review, to determine, after considering all the circumstances, whether the union's conduct amounts to the "isolated evil" Congress desired to prohibit—picketing used "to cut off the business of a secondary employer as a means of forcing him to stop doing business with the primary employer" (377 U.S. at 68). The rationale of *Tree Fruits* indicates that picketing having such an object is unlawful, whether

or not it also happens to be limited in terms to the struck products.[9]

B. We submit that the Board reasonably determined that the Union's picketing of the title companies was unlawful because, though directed only at Safeco's insurance policies, "the picketing [was] reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a). The stipulated facts (*supra*, pages 3-5) show that between 90 and 95 percent of the title companies' gross revenues are derived from the issuance of Safeco policies and the remainder from title research and escrow services, which are largely ancillary to the issuance of title insurance policies. The land title companies have no authority to issue title insurance in their own names or to act as agents for any other title insurance company without Safeco's permission. In

[9] The character of product picketing changes when the product constitutes all or virtually all of the neutral's business. As the Court of Appeals for the District of Columbia Circuit stated in an analogous situation (see *infra*, pages 18-20):

> When the pickets urge, either directly or by requests that render their meaning obvious, the entire boycott of the secondary establishment, they inject a new element. The restraint generated by the need to cross any such picket line may entirely inhibit consumers who are not whole-hearted union men but are unwilling to be readily identified as hostile or indifferent. There is no similar impact where the picketing acquiesces in the crossing of the picket line but merely urges that the consumer be selective on the inside. It is that sort of limited picketing message that *Tree Fruits* held outside the spirit of § 8(b) (4) (ii) (B). [*Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952, 957 (1968); footnote omitted.]

these circumstances, the Board was warranted in concluding that "a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the land title companies" (Pet. App. 59a).[10]

Contrary to the view of the court below, nothing in this Court's decision in *Tree Fruits* suggests that, so long as picketing is directed at the struck product, it is lawful regardless of its intended or foreseeable effect on the neutral's total business.[11] As Judge Robb stated in his dissenting opinion (Pet. App. 39a-40a):

[10] The Union must, of course, be deemed to have intended the natural and foreseeable consequence of its conduct. See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 45 (1954).

[11] The Board in finding a violation here has not, as the court below suggests (Pet. App. 28a-30a), returned to the economic impact test rejected by this Court in *Tree Fruits*. In that case, the court of appeals had held that the picketing there would be unlawful only if the appeal to Safeway's customers to boycott Washington State apples had or was likely to have "a substantial economic impact" on Safeway; it, therefore, remanded the case to the Board for a determination on that issue (308 F.2d at 317-318). This Court found a remand unnecessary since in the circumstances there "[a] violation of § 8(b) (4) (ii) (B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller" (377 U.S. at 72-73). The Court was not suggesting that the economic impact of the picketing would be irrelevant in other circumstances, where, as here, the struck product constituted substantially all of the neutral's business. Indeed, the Court emphasized that picketing of a neutral secondary violates Section 8(b) (4) (ii) (B) when it urges the public not to trade with him at all and thus seeks to inflict injury on his business generally (377 U.S. at 63-64, 72).

> [I]nstead of suggesting that its holding is applicable to a case like the one before us, the *Tree Fruits* decision plainly shows that it does not apply to cases in which a retailer sells only the struck product. The Court there recognized that Washington State apples "were only one of numerous food products sold in [Safeway] stores." 377 U.S. at 60. Furthermore, the Court believed that if the boycott at Safeway Stores were successful, the harshest result would be that "Safeway [might]drop the item as a poor seller." *Id.* at 72-73; see *id.* at 72 n.20. That the Court did not intend the exception it recognized for picketing of struck products to encompass and immunize total boycotts is again manifested by its observation that "consumer picketing to shut off all trade with the secondary employer . . . is poles apart from such picketing which only persuades his customers not to buy the struck product." *Id.* at 70. Picketing to shut off all trade, said the Court, is to be barred. *Id.* at 71; see *id.* at 63. The minimal impact to Safeway that the Court envisioned in *Tree Fruits* is thus hardly congruent with what the Board found the union's objective to be in this case—a total loss of patronage to the land title companies.

To put the matter another way, picketing which follows the struck product to a situation such as is involved in this case necessarily "creates a separate dispute with the secondary employer"—the very evil this Court identified in *Tree Fruits* as that which Congress sought to avoid (377 U.S. at 72).

Nor does the legislative history of Section 8(b)(4)(ii) support the view of the court below. While in

Tree Fruits the Court found that that history "does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites," it recognized that it did show that Congress intended to proscribe the use of such picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). And, while the Court concluded that "peaceful picketing at the secondary site directed only at the struck product" (*ibid.*) generally would not have the latter effect, the statements of Senator McClellan and Congressman Griffin, discussed by the Court (377 U.S. at 65-66, 67-68), clearly refer to circumstances, such as those here, where consumer picketing, though confined to the struck product, nonetheless calls for a boycott of the neutral's total business.[12]

---

[12] Thus, Senator McClellan gave as an example of "pressure in the form of dissuading customers from dealing with secondary employers," establishing a picket line around the store of a "merchant [who] may have built his business around the product, such as the John Deere plows or some kind of machinery from some other company"; the "merchant may have built up his trade entirely on that product." 105 Cong. Rec. 6667 (1959), II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 1194 (G.P.O. 1959) (hereafter "Leg. Hist."). Similarly, Congressman Griffin, in his colloquy with Congressman Brown, stated that Section 8(b)(4)(ii)(B) would prohibit consumer picketing at a retail store selling furniture products made by a manufacturer with whom the union had a primary dispute if "the purpose of the picketing is to coerce the retailer not to do business with the manufacturer." 105 Cong. Rec. 15672-15673 (1959), II Leg. Hist. 1615.

C. The court of appeals' view that *Tree Fruits* establishes a *per se* rule that secondary consumer picketing is privileged so long as it is directed at the struck product is inconsistent with the same court's application of that decision in the "merged product" situation. Thus, in *Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952 (D.C. Cir. 1968), the court sustained a Board holding that Section 8(b)(4)(ii)(B) barred picketing urging patrons of restaurants not to buy products advertised in a struck newspaper. Since the struck matter (advertising) was incorporated in every item sold by the neutral, the court concluded that the necessary effect of the union's picketing was to call for a total boycott of the neutral's business.[13] Addressing the union's contention that this "interpretation of *Tree Fruits* gives broader immunity to those secondary sellers who happen to be retailing struck primary products that are

[13] Accord: *American Bread Co.* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969) (picketing at eating places calling for a boycott of bread baked and distributed by the primary employer; held to be unlawful "since the subject matter of the picketing had become so integrated into the food served that to cease purchasing the single item would almost amount to customers stopping all trade with the secondary employer" (*id.* at 154)); *Hoffman* v. *Cement Masons Union Local 337*, 468 F.2d 1187 (9th Cir. 1972) (picketing at a housing subdivision calling for a boycott of homes built by a general contractor and sold by the neutral subdivision owner; held to be unlawful since union's "broad suggestion that [the primary's] products not be purchased * * * necessarily encompassed the entire business of * * * the neutral secondary" (*id.* at 1192)). See also *K & K Construction Co.* v. *NLRB*, 592 F.2d 1228, 1232 (3d Cir. 1979) and cases cited therein at 592 F.2d 1232 n.2.

so merged into the seller's total business as to be indistinguishable therefrom," the court answered that "the law makes distinctions in terms of the tradition and economic realities of Union pressure, even though this may result in differences not easily subject to logical delineation between the scope and kinds of picketing available to unions in different labor circumstances" (401 F.2d at 955-956; footnotes omitted). The court added (401 F.2d at 956):

> Here, where picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer (the newspaper) by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection * * *.

Although in *Honolulu Typographical*, the court below disclaimed any intention of passing on the "single product" situation (401 F.2d at 956 n.9), and it sought to distinguish *Honolulu Typographical* here (see note 15, *infra*), the rationale of that decision is equally applicable here.[14] As the court stated in *Hono-*

[14] Indeed, Safeco argued below that this case is itself a merged product case because the work done by the neutral land title companies in maintaining tract indexes, receiving orders, searching records, and preparing reports, commitments, and policies is merged into the struck primary product—Safeco title insurance (Pet. App. 53a). It was unnecessary for the Board to pass on this issue, given its view that merged and single product cases are legally indistinguishable.

lulu Typographical, the character of the union's "conduct as a threat to the secondary seller is a function of its impact on the consumer" (401 F.2d at 957). That impact—pressure for a total boycott of the neutral—is the same whether it is achieved because the primary's product has merged into that of the neutral or because virtually all of the neutral's business consists of selling the primary product. Similarly, the goal of Section 8(b)(4)(ii)(B) to protect neutral employers from being enmeshed in disputes not their own through pressure designed to injure their businesses generally is equally thwarted whether the union's consumer picketing presages a total shutdown of the neutral because there is no separate identifiable primary product to boycott or because the neutral's entire business is dependent on sales of the primary product.[15]

[15] The court below sought to distinguish the two situations on the ground that, when a secondary employer sells a struck product in the form in which it leaves the primary employer, "the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory." When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the "struck product no longer has a market of its own and it cannot be pursued into the market for the merged product without implicating its other components" (Pet. App. 31a n.93). But, as shown above (pages 18-19), the statutory purpose of preventing a picket-line appeal for a total boycott of the neutral's business can be thwarted as readily where the struck product retains its market as it can where it merges with another product to create a new market. Accordingly, the distinction drawn by the court below is irrelevant for purposes of Section 8(b)(4)(ii)(B).

Nor may the decision of the court below in this case be justified on the ground that the picketing placed no more pressure on the neutrals than that which would have been exerted had the primary strike been successful (Pet. App. 25a). See also *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, 401 F.2d at 955. The contention that a union may lawfully exert on a neutral the same degree of pressure that would be exerted by a successful primary strike has been rejected in other contexts as a distortion of congressional intent under Section 8(b)(4) of the Act. As the Fifth Circuit stated in *Superior Derrick Corporation* v. *NLRB*, 273 F.2d 891, 896, cert. denied, 364 U.S. 816 (1960): "[T]his is to disregard the plain language and purpose of 8(b)(4)(ii)(A) and (B) * * *. For if illegality is to be measured by the comparable effect which the picket line would have [at the primary's premises], a primary union might have —and could even express it in categorical terms—a purpose and intent to cause the secondary employer to cease doing business with the primary employer and yet the conduct would still be legal." "It is precisely because primary activity may *not be sufficiently successful* to cause the kind of interference with the business of the secondary employer which will result in the exertion of secondary pressure to force the primary employer to settle the labor dispute that Congress sought to prohibit unions from accomplishing

by other means that which they could not accomplish directly." Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 Va.L. Rev. 189, 212 (1966) (emphasis in original). There is no reason to believe that, in *Tree Fruits*, the Court, in carving out a limited exception for secondary product picketing, intended to upset this well settled law. On the contrary, as shown above (pages 12-17), the test enunciated by the Court in *Tree Fruits* is not whether the picketing puts no more pressure on the neutral than would a successful primary strike, but rather whether the picketing is designed to shut off all trade with the neutral. The Union's picketing here met that test.

II. SECTION 8(b)(4)(ii)(B) AS APPLIED IN THIS CASE IS CONSTITUTIONAL

There is no merit to the suggestion of the court below (Pet. App. 34a-35a) that the Union's picketing here could not constitutionally be regulated. "[W]hile picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1950). Because of the "compulsive features inherent in picketing" (*id.* at 468), picketing aimed at preventing effectuation of a constitutionally permissible legislative policy may be constitutionally enjoined. *Teamsters Union* v. *Vogt*, 354 U.S. 284, 289-290, 293 (1957); *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215, 229-231 (1974); *Int'l Brotherhood of Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951).

Accordingly, as *Tree Fruits* itself recognizes, although "a broad ban against peaceful picketing" might be unconstitutional, it was proper for Congress to deal with the "isolated evil" of "peaceful consumer picketing at secondary sites * * * to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer" (377 U.S. at 63). See also *Babbitt* v. *United Farm Workers*, No. 78-225 (June 5, 1979), slip op. 20 n.17 ("picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution"). As the dissenting opinion below concluded, the statutory prohibition against the picketing in this case does not raise "substantial first amendment questions; for '[r]ead as barring only picketing urging [a] total consumer boycott, . . . the statute strikes narrowly at those "inherently compulsive features" present when consumers must cross a line.'" (Pet. App. 40a n.1, quoting *Honolulu Typographical Union No. 37* v. *NLRB*, *supra*, 401 F.2d at 957 n.11).

The narrowness of the prohibition here is emphasized by the proviso to Section 8(b)(4) specifically exempting "publicity, other than picketing, for the purpose of truthfully advising the public * * * that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," provided that the publicity does not have the effect of cutting off the neutral's deliveries or inducing his

employees to cease work. See *Tree Fruits, supra*, 377 U.S. at 70-71. Thus, the Union here was free to advise the public of its dispute with Safeco by distributing handbills at the neutral title companies' premises; it was merely prohibited from using the compulsive features inherent in a picket line with an object of shutting off all trade with the neutrals.[16]

Police Department of the City of Chicago v. *Mosley*, 408 U.S. 92 (1972), relied on by the Union below, does not support its claim of unconstitutionality. The city ordinance found unconstitutional there prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. In finding the ordinance violative of the Equal Protection Clause, the Court held that no valid legislative purpose was served by broadly prohibiting all picketing near schools, while exempting peaceful labor picketing, since there was no basis for the city's claim that nonlabor picketing is more apt to produce violence than labor picketing (408 U.S. at 100-102). Here, by contrast, there is a valid legislative purpose in prohibiting unions from using secondary boycotts

[16] Contrary to the suggestion of the court below (Pet. App. 34a-35a), that prohibition is not unconstitutionally indefinite because it requires inferring an unlawful object from the surrounding facts. An unlawful object is rarely admitted and must usually be inferred. The facts supporting such an inference here—that almost the entire business of the neutrals is devoted to the sale of the primary's product so that the union's picketing, if successful, would predictably result in a virtually complete boycott of the neutrals' businesses—are neither impermissibly vague nor difficult of ascertainment.

to enmesh neutrals in labor disputes not their own.[17] The First Amendment, of course, "does not command 'that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please.'" *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 178 (1976) (concurring opinion of Mr. Justice Brennan), quoting *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966).

In sum, we submit that no substantial First Amendment issue is presented here and that "'[t]he Board's resolution of the conflicting claims in this case represents a defensible construction of the statute'" entitled to judicial affirmance (Pet. App. 43a (dissenting opinion), quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978)). See also *NLRB* v. *Weingarten*, 420 U.S. 251, 260, 266-267 (1975).

[17] Even less pertinent are cases cited by the Union below where restrictions on various forms of communication other than picketing were found not justified by a valid legislative purpose. See, *e.g.*, *Virginia Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748 (1976) (invalidating statute declaring it unprofessional conduct for licensed pharmacists to advertise price of prescription drugs); *Linmark Associates* v. *Willingboro*, 431 U.S. 85 (1977) (invalidating township ordinance prohibiting the posting of "for sale" and "sold" signs on real estate). Those cases did not involve the compulsive elements inherent in a picket line, and, to the extent they may suggest a constitutional right of the public to be informed of the existence of a labor dispute between the neutrals and the primary employer, that right is satisfied by the proviso authorizing publicizing of the dispute by means other than picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

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BRIEF FOR THE UNION

The Brief For The National Labor Relations Board (hereinafter "Bd. Br.") sets out the opinions below, the basis of this Court's jurisdiction, and the statute involved. (See Bd. Br. 1-3.)

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, under the rule stated in *Labor Board* v. *Fruit Packers*, 377 U.S. 58 (*Tree Fruits*) explicating § 8(b)(4)(ii)(B) of the National Labor Relations Act, unions may lawfully engage in peaceful consumer picketing confined to a struck product wherever the product is sold, or whether unions may engage in such picketing only if the struck product does not constitute a predominant portion of the seller's business?

2. If § 8(b)(4) does bar such picketing does the Section to that extent violate the First Amendment?

COUNTERSTATEMENT OF THE CASE

In 1974, Local 1001 of the Retail Store Employees Union, Retail Clerks International Association, AFL-CIO, became the certified collective-bargaining representative of certain employees of Safeco Title Insurance Company which underwrites title insurance in the State of Washington. Contract negotiations reached an impasse, and the employees went on strike and began picketing Safeco's office in Seattle. On various occasions thereafter, striking employees, acting on the Union's behalf, picketed the premises of one or more of five land title companies selling Safeco Insurance and having close business ties with Safeco.[1] The land title companies conduct real estate title searches, issue title insurance policies and perform escrow services. Safeco underwrites all of their policies, from which a predominant portion of their revenues are derived. (Pet. App. 50a-52a.)

The entirely peaceful picketing was directed solely to the general public. It did not result in any work stoppage or interference with deliveries. (Pet. App. 50a-51a.) (Indeed, the record does not show whether more than one picket appeared at any time.) And, as the Board recognized, the picketing sought "to persuade customers of the land title companies to refrain from purchasing [Safeco] insurance". (Pet. App. 52a.)

One of the land title companies filed secondary boycott

[1] Land Title Company of Clark County, Land Title Company of Cowlitz County, Land Title Company of Kipsap County, Land Title Company of Pierce County and Land Title Company of Snohomish County.

charges with the National Labor Relations Board and Safeco filed similar charges of its own. A complaint was issued by the Board's General Counsel and the parties stipulated the facts just summarized, waived intermediate proceedings before an administrative law judge and submitted the case directly to the NLRB for decision. (Pet. App. 47a-48a.)

The Board passed on two issues and concluded (3-2):

First, "The land title companies are neutral and separate employers with respect to Safeco's dispute with Respondent". (Pet. App. 56a.)

Second,

> Between 90 and 95 percent of the title companies' gross revenues is derived from the issuance of Safeco policis. * * * [Thus, the] land title companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the Union's consumer appeal were successful. We find, therefore, that Respondent's consumer appeal constitutes a coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the [National Labor Relations Act, as amended]. [Pet. App. 59a.]

While the NLRB outlined other issues raised by its General Counsel and by Safeco (Pet. App. 52a-53a), the Board did not reach those contentions and specifically noted "In view of [our] determination, we find it unnecessary to pass on Charging Party Safeco's contention that the picket sign was improper". (Pet. App. 59a, n. 16.)

On the Union's petition for review, the court below, *en banc* (5-4), agreed with the Board on the neutrality issue (Pet. App. 6a-11a) but disagreed on the legality of the consumer picketing. That court held in the latter regard:

> The test of "threaten[ing], coerc[ing], or restrain-[ing]" which we thus distill from the Supreme Court's decision in [*Labor Board* v. *Fruit Packers*, 377 U.S. 58] *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor, or whether the picketing projects its force beyond these boundaries. So measured, the activity in the instant case does not contravene the stricture of Section 8(b)(4)(ii)(B). [Pet. App. 26a.]

That court therefore remanded this proceeding to the Board noting "Our disapprobation of the order under review is without prejudice to such consideration as the Board may be inclined to give the pretermitted questions [raised by Safeco but not decided by the Board]." (Pet. App. 6a, n. 13 continued.)

The Board's petition for a writ of certiorari followed.[2]

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[2] Although Safeco continues to press its alternative theories for upholding the General Counsel's complaint (Brief of Safeco Title Insurance Company, 11-12 (hereinafter "Safeco Br.")) these arguments are not properly presented here since neither the Board nor the Court of Appeals passed on them. (*SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 and the other cases cited by the court below at Pet. App. 5a-6a, n. 13). Moreover, having chosen to oppose the Board's petition but not to cross-petition for certiorari on the "neutrality" issue, we do not, in light of the rule of *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n. 4, treat with that issue in this brief.

SUMMARY OF ARGUMENT

I

In *Labor Board* v. *Fruit Packers*, 377 U.S. 58 ("*Tree Fruits*") this Court held that §8(b)(4)(ii)(B) of the NLRA does not prohibit a union from peacefully picketing at a retail establishment selling a struck product confined to asking consumers not to buy that product. The Court of Appeals correctly held, reversing the Board, that under *Tree Fruits* such picketing does not transgress the Act simply because the establishment at which it occurs deals predominantly in the struck product. The lesson that court "distilled" from the *Tree Fruits* opinion is that so long as "the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor" it is lawful, whereas "picketing [that] projects its force beyond those boundaries" is unlawful. (Pet. App. 26a.) In reaching that conclusion the court below undertook a meticulous and thoughtful study of the *Tree Fruits* opinion. And the Court of Appeals pointed out, *inter alia*, that the Board's approach, which focuses on the economic effect of the picketing on the retailer, resurrects the theory which had been advanced by the *Tree Fruits* Court of Appeals and which was expressly rejected by this Court.

The Board counters with two fragments from the legislative history, both of which were considered in *Tree Fruits* and neither of which illustrate a particular intent to proscribe predominant product picketing. The NLRB also relies on its own cases approved by several of the courts of appeals (including the court below) holding that consumer picketing against a "merged product" (a good that incorporates the struck product) is unlawful under *Tree Fruits*. But as the Court of Appeals explained, that result is not

inconsistent with the result that court reached here because in contrast to the instant situation, the "struck product * * * can not be pursued into the market for the merged product without implicating its other components." (Pet. App. 31a, n. 93).

Safeco ultimately argues that *Tree Fruits* should be reconsidered. But the company fails to do business with the reasoning of that opinion, advances nothing new in the legislative history, and can point to no subsequent developments which would justify a reinterpretation of the statute.

II

In *Tree Fruits* Mr. Justice Black concurred in the judgement on the ground that § 8 (b)(4)(ii)(B) as there construed by the Board worked a constitutionally impermissible discrimination against "free discussion of one side of a certain kind of labor dispute." (377 U.S. at 77.) In *Cox* v *Louisiana,* 379 U.S. 559, which involved a preference for labor picketing, Justice Black again concurred separately in invalidating the restraint imposed, invoking the same constitutional ground. That opinion was expressly approved in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, which struck down an ordinance that prohibited all picketing near a school excepting only labor picketing:

> Necessarily, *** under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. [408 U.S. at 96.]

The Court has several times since reaffirmed the *Mosley* principle. (See, e.g. *Erznoznik* v. *City of Jacksonville,* 422

U.S. 205; *Madison School District* v. *Wisconsin Emp. Rel. Comm.,* 429 U.S. 167; *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765.)

These authorities require the conclusion that § 8(b)(4)(ii)(B) as construed by the Board impermissibly singles out for interdiction peaceful picketing by unions asking members of the public not to buy a disfavored product carried by a retailer from the same activity at the same place by any other organization. For this prohibition is discriminatory in two respects. First, there is nothing in reason, experience, or the legislative record that demonstrate that such picketing by unions has different consequences from picketing by everyone else. Second, the Section does not cover those selling the product, leaving them free to use every form of persuasion, including such comparable advertising techniques as large signs affixed to the premises, to convince shoppers to buy.

III

A. In defending the constitutionality of the Board's construction of § 8(b)(4)(ii)(B), the briefs on petitioner's side base their case entirely on the fact that the subject of regulation in this case is picketing. But it has been clear since *Thornhill* v. *Alabama,* 310 U.S. 88, and was recognized in *Mosley, supra,* 408 U.S. at 99, that "[p]icketing plainly involves expressive conduct within the protection of the First Amendment." Moreover, while this Court has in a series of cases sustained injunctions against picketing, it has made plain that "the mere fact that there is 'picketing' does not automatically justify its restraint without an invesigation into its conduct and purposes." (*Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284, 294-295).

B. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765,

defined "speech at the heart of the First Amendment's protection," by quoting *Thornhill*, which stated in part: "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment • • •." (310 U.S. at 101.) In *Thornhill*, that freedom was held to include the dissemination of information regarding the facts of a labor dispute. And *Thomas* v. *Collins*, 323 U.S. 516, held that the First Amendment protects a peaceful effort to persuade workers to action by joining a labor union.

C. The precedents in this Court establish further that legislation does not meet the "exacting scrutiny" standard applied to restrictions on free speech (*Bellotti*, 435 U.S. at 786) because it seeks to advance the economic interests of one group in the community by denying the general public truthful information concerning decisions the latter have the lawful right to make. The decisive decision is *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748. The Court found the "justifications for the [price] advertising ban [at issue] • • • to be constitutionally insufficient" because "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." (*id.* at 766, 769) This "highly paternalistic approach" was deemed incompatible with the very essence of the First Amendment. The Court expressly recognized that the state could prohibit price competition, but it could not permit businessmen an option between a low-price, limited-service policy and a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at a high price by stemming the free flow of price information to consumers.

Va. Pharmacy Bd. was followed in *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, which held that the First Amendment does not "permit a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goals • • • [of] stable racially integrated housing" (*id.* at 94).

D. The cases cited on the Board's side do not support the proposition that the constitutional rights declared in cases like *Va. Pharmacy Bd.* are forfeited because the means of communicating the information regarding the labor dispute to the public is a picket sign carried at a store which sells the struck product. The leading case in the line of authority on which our adversaries rely is *Giboney* v. *Empire Storage Co.*, 336 U.S. 490. The union there was engaged in picketing addressed to employees who were subject to discipline if they crossed the picket line; the object of the picketing was to cause those employees to refuse to pick up from or deliver goods to Empire in order to compel Empire to violate Missouri's criminal law by discontinuing business with nonunion peddlers. On these facts, picketing was indistinguishable from a verbal inducement to the employees to commit an illegal act by joining in the conspiracy in restraint of trade; as Justice Black stated (citing, *inter alia, Fox* v. *Washington*, 236 U.S. 273, and labor cases involving employer coercion of empiloyees), such verbal acts have never been protected by the First Amendment(336 U.S. at 501-502).

Our argument discusses in detail the decisions generated by *Giboney*. In *Giboney* the picketing invited an illegal act (the refusal by employees to deliver) in order to achieve an

illegal objective (Empire's refusing to deal with non-union peddlers). In *Electrical Workers* v. *Labor Board,* 341 U.S. 694 (which sustained the secondary boycott provision of the NLRA with respect to picketing addressed to employees), the picketing induced employees to engage in a strike which was itself an unfair labor practice under the same provision of the NLRA. These, we think, are constitutionally correct results. A different question is presented by cases such as *Hughes* v. *Superior Court,* 339 U.S. 460, where the picketing induces lawful conduct (there, the refusal by consumers to patronize a store) in order to accomplish an objective which is either prohibited, or contrary to public policy (there, to compel the employer to engage in racial quota hiring). We believe that in this latter class of cases the prohibition of picketing is far more questionable, particularly where the ultimate object, though against "public policy," is not enforced by any sanction, civil or criminal. But the point need not be decided since this case is at the opposite end of the spectrum from *Giboney.* (Cf. *United States* v. *12 200 Ft. Reels of Film,* 413 U.S. 123, 127.) For here the object of the picketing is contrary to public policy only in what Professor Cox has aptly called "the Pickwickian sense" that the Government has outlawed picketing to achieve that objective. No case in this Court has sustained such a ban on picketing, which would amount to a blanket prohibition forbidden since *Thornhill.*

All but one of the *Giboney* line of decisions involved picketing addressed to employees, and are distinguishable for that reason. The sole exception, which did involve picketing addressed exclusively to consumers, is *Hughes* v. *Superior Court,* 336 U.S. 490. We first suggest that *Hughes* may properly be confined to the "circumstances of th[at] case" (*id.* at 469), a *caveat* given point by the Court's most

recent consumer picketing case, *Teamsters Union* v. *Newell,* 356 U.S. 341, which summarily reversed a state court ban on consumer picketing, citing *Thornhill.*

We show next that, as Professor Cox has written, picketing addressed to consumers to publicize the existence of a labor disputes, as in this case, is significantly different from picketing which gives a "signal" to organized employees, as in *Giboney.*

We then discuss language in the *Hughes* opinion which contrasts the "compulsive features" of picketing with "appeals to reason". If this statement was intended to state a constitutional rule that only such appeals are entitled to the protection of the First Amendment, it is clearly wrong. The decision in *Cohen* v. *California,* 403 U.S. 15, and Justice Harlan's forceful reasoning therein, particularly, *id.* at 24-26, demonstrate the error beyond debate. (See also, *Spence* v. *Washington,* 418 U.S. 405, and *Linmark, supra.*) Moreover, Mr. Justice Frankfurter in this portion of the *Hughes* opinion did not engage in the "critical scrutiny" demand by accepted First Amendment principles, but invoked the far more expansive standard of the equal protection cases involving economic regulation.

Finally, we show that the *Hughes* opinion in its entirety rested not on First Amendment principles as they have been set down in subsequent cases, but on the standard of "ordered liberty" derived from *Palko* v. *Connecticut,* 302 U.S. 319. For that additional reason, *Hughes* cannot be regarded as presently authoritative. More specifically *Hughes* proceeded as if the "conduct" aspect of picketing could, for constitutional purposes, submerge its expressive content. Subsequent decision have adopted an entirely different approach, far more protective of the right

to communicate. (See *United States* v. *O'Brien*, 391 U.S. 367, 376-377.)

E. The prohibition of the picketing herein can not be sustained on the ground that other forms of publicity are not forbidden. While *Linmark* recognizes that this fact may be relevant, that case holds that it is not a constitutionally sufficient ground for forbidding one means of communication. Rather, it must be demonstrated that the alternatives are not materially less effective forms of communication, and that the regulation is truly directed to time, place and manner rather than content. (See 431 U.S. at 493-494.) Section 8(b)(4)(ii)(B), as construed by the Board, satisfies neither of these conditions.

ARGUMENT

I

CONSUMER PICKETING CONFINED TO THE STRUCK PRODUCT DOES NOT VIOLATE § 8(b)(4)(ii)(B) WHETHER OR NOT THAT PRODUCT CONSTITUTES A PREDOMINANT PORTION OF THE RETAILER'S SALES

As the Court of Appeals noted, the NLRB in this case "predicated its decision exclusively on the fact that Safeco Title Insurance predominated the [Land Title] Companies' sales". (Pet. App. 27a, n. 84). Because of this product predominance alone the Board claims that, in contrast to the result reached by this Court in *Labor Board* v. *Fruit Packers*, 377 U.S. 58 ("*Tree Fruits*"), the Union here committed an unfair labor practice when it followed the products of an employer with whom it had a labor dispute to retail outlets and asked members of the consuming public, *via* picket signs and handbills, to refuse to purchase those products.

According to the Board, a union's right to picket to seek support from potential consumers of a particular product turns on how the primary employer markets its products—through exclusive or near-exclusive outlets on the one hand, or through retailers who deal in the products of many producers on the other. For, on the Board's view of *Tree Fruits*, § 8(b)(4)(ii)(B) would forbid struck product picketing of retailers closely tied economically to the primary employer, while permitting such picketing where the retailer is merely a purchaser of the primary employer's product as one among many.

This determination, of course, operates in a manner obverse to what one would expect, given the basic focus of the secondary boycott prohibitions—"Congressional concern

over * * * pressure brought to bear * * * not 'upon the employer who alone is a party [to a dispute] but upon some third party who has no concern in it.' " (*NLRB* v. *Operating Engineers* 400 U.S. 297, 302-303.) For, as the facts of this and other cases, show,[3] a high degree of predominance of a single producer product in a retailer's stock is usually accompanied by other types of economic interdependence as

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[3] The Court of Appeals ruled that "while indubitably the relationship between Safeco and the land title companies exudes strong economic interdependence that is too little to vitiate the Board's conclusion on the factually varying and frequently complex status of neutrality" (Pet. App. 10a-11a). We do not challenge that portion of the decision below (See p. 4, n. 2 *supra.*) The fact that these companies are neutrals for purposes of § 8(b)(4)(B) means, for example, that an appeal by the Union in this case to their employees to strike in support of the Union in its dispute with Safeco would be a violation of § 8(b)(4)(i)(B). But this determination of neutrality, which is a prerequisite to *any* application of the secondary boycott provisions, does not mean that the precise relationship between the "neutral" and the primary is not pertinent in determining the reach of § 8(b)(4) in particular circumstances. (Cf. *Electrical Workers* v. *Labor Board,* 366 U.S. 667 (*General Electric*) (whether or not picketing at a primary employer's premises which induces employees of secondary employers working on the premises to respect the picket lines violates § 8(b)(4) depends on whether the "neutral" is "performing tasks unconnected to the normal operations of the struck employer." (*Id.* at 680).)

In this case, Safeco owns between 12% and 53% of the land title companies' stock. Each company has at least one director who is a Safeco officer, and one has two such directors. Moreover, the "Agency Contract" between Safeco and each of the companies grant Safeco such controls over the latters' business, as to whom and at what price policies may be issued. (See Pet. App. 3a-4a.)

Similarily, in *Steelworkers Local 14055 (Dow Chemical Co.)* 211 NLRB 649, enforcement denied 524 F.2d 853 (C.A.D.C.), vacated and remanded 429 U.S. 807, complaint dismissed on remand, 229

well with the primary employer.

This anomalous result derives from a view of *Tree Fruits* which, as the Court of Appeals recognized, may have some superficial support in selected "passages [in this Court's opinion] read in isolation" (Pet. App. 22a) but is in its underlying theory "totally at war with *Tree Fruits*". (Pet. App. 29a). For, contrary to the Board's suggestion, the *Tree Fruits* Court *did* hold that "so long as picketing is directed at the struck product, it is lawful regardless of [the] intended or foreseeable effect [of refusals to buy that product] on the neutral's total business" (Bd. Br. 15), and it *did not,* as the NLRB supposes, grant the Board the authority to examine the *economic* facts of each case to discover whether "the picketing is really calculated to induce customers not to patronize the neutral parties at all" (Pet. App. 58a).

A. The Board, and Safeco, approach this case as if this Court had intentionally created a paradox. *Tree Fruits,* they begin, was based upon a dichotomy between "consumer picketing to shut off all trade with the secondary employer" and "picketing which only persuades his customers not to buy the struck product". (See *Dow, supra,* 211 NLRB at

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N.L.R.B. 302, the "neutral" gasoline stations were all leased or subleased from Dow, the primary employer, in some instances at rents based on a percentage of gasoline sold; Dow provided various forms of financial assistance to the retailers, including assigning bank notes and assuming the cost of some equipment; and, in some instances, Dow exercised financial controls such as approving the amount of insurance and monetary reserves of the retailers. (211 NLRB at 650, 655 n.16 (dissenting opinion).) As the dissenting Board members in *Dow* noted, "These facts are of a type common where a retailer deals solely or principally in products supplied by another; they show the economic realities underlying their relation." (*Id.* at 655 n. 16.)

651.)[4] In this case, according to the Board and Safeco, that dichotomy exists, if at all, only in a trivial sense; where the struck product is virtually all of the secondary employer's trade, the two situations are not, as the *Tree Fruits* Court stated, "poles apart", but, rather, precisely congruent. They therefore contend that *Tree Fruits* cannot be controlling here, and that the Board is free "to make [its] own independent judgment as to whether the picketing is permissible under the Act," (*Dow, supra,* 211 NLRB at 651), by choosing one of the two *Tree Fruits* "poles". But, *Tree Fruits,* when read as a whole, *does* provide "the criterion distinguishing the permissible from the forbidden" (Pet. App. 23a) in the situation here, just as in the situation presented in that case.

The central issue in *Tree Fruits* was whether product-limited picketing can be said to "threaten, coerce or restrain" *in the sense Congress intended to use those terms* in § 8(b)(4)(ii). The Court approached this question, as it has necessarily always approached issues regarding the reach of § (8)(b)(4),[5] as one requiring sensitive understanding of the basic Congressional purpose—to avoid creating "a separate dispute with the secondary employer" (377 U.S. at 72). The Court concluded that:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. [*Id.*]

[4] The Board's opinion in this case was explicitly based on "the views expressed in the Board opinion in [*Dow.*]" (Pet. App. 58a, n. 15.) Because the Board's analysis in this case was consequently presented largely by reference to the fuller discussion in *Dow*, we refer liberally to the Board's *Dow* opinion in seeking to derive the rationale of the present decision.

[5] This Court has long recognized that "This provision could not be literally construed; otherwise it would ban most • • • lawful so-called primary activity." (*General Electric, supra,* 366 U.S. at 672; see also e.g., *Operating Engineers, supra,* 400 U.S. at 302-303.)

As an example of its meaning, the Court provided the following:

> If a public appeal directed only at a product results in a decline of 25% in the secondary employer's sales of that product, the corresponding reduction of his purchases of the product is due to his inability to sell any more. But if the appeal is broadened to ask that the public cease all patronage, and if there is a 25% response, the secondary employer faces this decision: whether to discontinue handling the primary product entirely, even though he might otherwise have continued to sell it at the 75% level, in order to prevent the loss of sales of other products. [*Id.*, n. 20]

As the Court of Appeals demonstrated, from this explication the basic parameters of the *Tree Fruits* rationale readily emerge. First:

> When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary and secondary employers is simply a reflection of the consuming public's reaction to the un-

> ion's limited appeal, geographically extended as it was from the primary to the secondary site. [Pet. App. 25a-26a.]

Plainly, it makes no difference in this regard whether the struck product is a large or small portion of the retailer's sales; in either case, the effect on the "neutral" comes about only because and to the extent that "the public has diminished its purchase of the struck product."

Second, Congress sought to preclude picketing that creates a separate dispute with the secondary employer because "when the picketing is utilized to induce customers to forsake the secondary employer completely he 'stops buying the struck product,' the *Tree Fruits* Court reminds, 'not because of a falling demand, but in response to pressure designed to inflict injury on his business generally.'" (Pet. App. 26a.) The *Tree Fruits* rule protects retailers from the economic consequences of the loss of other business, not from the economic consequences of falling demand for the struck product. The example given in *Tree Fruits,* and quoted above, makes this entirely lucid.

Third, read in this light, neither the "poles apart" dichotomy nor the other references in *Tree Fruits* to picketing which "persuades the customers to • • • stop all trading" invite the paradox which the Board attributes to that decision. Rather, it becomes apparent that the critical distinction drawn by *Tree Fruits* is between consumer picketing confined to the struck product and such picketing which goes beyond the struck product to encompass other items or services offered at the secondary situs.

This case fits squarely within the *Tree Fruits* rationale thus understood:

> The test of "threaten[ing], coerc[ing], or restrain-

> [ing]" which we thus distill from *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefore, or whether the picketing projects its force beyond these boundaries. So measured, the activity in the instant case does not contravene the stricture of Section 8(b)(4)(ii)(B). The union had struck and picketed Safeco, the purveyor of title insurance to the public through the land title companies. The union expanded the area of the picketing to include the premises of these companies, and that, for purposes of its decision, the Board took as activity tailored to persuading consumers to boycott Safeco insurance. While most of the companies offered little else—title searches and escrow services—there is no suggestion that the picketing was structured to affect anything but the struck insurance. The union seemingly was bent on drastically curtailing the market for that product, but that was all. [Pet. App. 26a-28a.]

In *Tree Fruits* the Court observed that the common law recognized the "distinction between picketing a secondary employer merely to 'follow the struck goods' and picketing designed to result in a generalized loss of patronage." (377 U.S. at 64, n. 7.) Given that recognition it is instructive that the most authoritative statement of the common law rule is formulated in terms that appear to pre-echo the *Tree Fruits* rule as explicated by the Court of Appeals. Section 799 of the A.L.I. Restatement of Torts (1939) states:

> Employees are not liable to their employer for harm caused by inducing third persons through fair persuasion and for a proper object to refrain, during their dispute with the employer, from
>
> (a) patronizing him or buying from any one else goods or services sold, produced or processed by him, • • •

The Comment thereto explains:

> • • • When the employer produces goods which are distributed by others, the effort to restrict his consumers' market in the manner stated in this Section may be extended to all persons who purchase the goods produced by him, whether the purchases are made from him directly or from others who distribute those goods. If, for example, A is the manufacturer of the X brand soap, employees may, under the rule stated in this Section, induce wholesalers, retailers and housewives not to purchase that soap. Within the limits of fair persuasion, they may do so by advertising in newspapers, by distribution of circulars, by picketing, and by any other means. If the fair persuasion is in the form of picketing, the pickets may be stationed wherever the soap is sold and they may there seek to persuade prospective purchasers. Thus, they may be stationed at A's factory or at B's retail store where the soap is sold. *In all these cases, however, the scope of the request must be limited to A and his products. If the request is so confined, A is not entitled to complain, since his loss of sales is due only to the fair persuasion of the prospective purchasers. B, the retailer, is also not entitled to complain, since the action is not directed at him and his loss of sales, if any, is due only to the diminution in the prestige of the goods which he buys and markets, a diminution which A's employees are privileged to cause* • • •. *If, however, the third persons are requested not to buy other goods from B because he sells A's soap, the rule stated in this Section is inapplicable* • • •; *for then B is being induced not to buy from A and his inducement is not by fair persuasion but by economic pressure. If he continues to market A's soap, he is threatened not merely with loss of sales of that soap but with loss of sales of other products having no relation to A. This is economic pressure on B, not involved in the previous example, to induce him not to buy from A* • • •. [Emphasis added.]

B. The NLRB not only misread the distinction the Court drew in *Tree Fruits,* but also adopted a theory explicitly *rejected* in that case—*viz,* that consumer picketing is illegal secondary activity if "a successful boycott • • • would predictably involve a virtually complete boycott of the [retailer] • • • [with] the predictable result of bringing the [retailer] into its dispute with • • • Safeco" (Pet. App. 59a.) The course of decision there makes the Board's error patent.

First, the *Tree Fruits* Court was reviewing a court of appeals opinion which had refused enforcement of the Board's unfair labor practice order on the ground that "the statutory requirement of a showing that respondents' conduct would 'threaten, coerce, or restrain' Safeway could only be satisfied by affirmative proof that a substantial economic impact on Safeway had occurred, or was likely to occur as a result of the conduct," (377 U.S. at 62), and had remanded the case to the Board for a factual determination of economic impact. This Court, in its decision, rejected not only the Board's pre-*Tree Fruits* thesis that *all* consumer picketing is coercive within the meaning of 8(b)(4)(ii), but also stated its "disagree[ment] with the Court of Appeals that the test of to 'threaten, coerce or restrain' is whether Safeway suffered or was likely to suffer economic loss," (*id.* at 72), and "remanded with direction to enter judgment setting aside the Board's order." As the court below noted, it is indeed "difficult to imagine a more explicit rejection of the economic-impact theory of prohibited coercion." (Pet. App. 30a.)[6] Yet the Board, in the face of

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[6] The Board's counsel protests that:

> The Court was not suggesting that the economic impact of the picketing would be irrelevant in other circumstances, where, as here, the struck product constituted substantially

this rejection, has read *Tree Fruits* as based solely upon the view that "the minimal impact picketing there would have had, if successful, upon the total business of the secondary retailer would not justify a conclusion that an object of the union was to persuade the retailed to discontinue handling the struck product to cut its losses," (*Dow, supra,* 211 NLRB at 651) and devised its present approach upon that entirely erroneous premise.

Second, the *Tree Fruits* Court was quite aware that at some level of economic impact, Safeway might have to "drop the [primary] item as a poor seller" (377 U.S. at 73) and thus cease doing business with the primary employer entirely, rather than merely to the extent of decreased demand. Nevertheless the Board now argues that in this case "[the Union's] activities therefore had the predictable result of dragging the land title companies into its dispute * * * [because the] companies * * * would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful." (Pet. App. 59a.) How this dynamic differs in any material respect from the "poor seller" example in *Tree Fruits* we are not told. The *Tree Fruits* Court did not assume that it was not a predictable result—or even an object—of the picketing economically

all of the neutral's business. Indeed, the Court emphasized that picketing of a neutral secondary violates Section 8(b)(4)(ii)(B) when it urges the public not to trade with him at all and thus seeks to inflict injury on his business generally (377 U.S. at 63-64, 72). [Bd. Br., 15.]

But, as we have seen, the emphasis in *Tree Fruits* upon injury to the retailer's business "generally" pertained not to the extent of foreseeable economic impact but to its character—*viz.,* to whether it extended beyond the struck product to "other products". Thus, the Court in *Tree Fruits* was not only "suggesting" but squarely *holding* that as long as the appeal was confined to the struck product, the economic effect on the retailer was irrelevant.

to influence the retailer to cease entirely dealing in the primary's products. Rather, as Judge Fahy noted in *Dow, supra,* the Court in *Tree Fruits* held that as long as the appeal is limited to the struck products there is no "separate" dispute but only a geographical expansion of the primary dispute:

> Thus, the Court did not say that the picketing in *Tree Fruits* did not threaten, coerce or restrain Safeway and therefore did not fall within the area Congress intended to prohibit by section 8(b)(4). The Court said that since the picketing was not conduct of the kind which Congress intended to prohibit by the provision, it followed that it did not threaten, coerce or restrain the secondary within the meaning Congress attached to the provision. It was not one of the "isolated evils" intended to be prohibited by section 8(b)(4). The Court viewed Congress as having determined that the possible loss to a secondary caused by this means of publicizing a labor dispute with the producer of the struck products, when weighed against a policy favoring the right peacefully to publicize the dispute, did not outweigh the right. [524 F.2d 853, 858-859.]

Third, the *Tree Fruits* Court explicitly noted the possibility that

> all picketing automatically provokes the public to stay away from the picketed establishment. The public will, it is said, neither read the signs, hand bills, nor note the explicit injunction that "This is not a strike against any store or market." [377 U.S., at 71].

Of this possibility, the Court said simply "[b]e that as it may," Congress did not intend to prevent such picketing. (*Id.*) The Court did not remand for a determination of whether such a result was likely—or even intended. The Court regarded an impact beyond the struck product as irrelevant as long as the Union does not seek such an im-

pact. Thus, even if one supposes that consumers are unlikely to enter a retailer's premises at all in response to product picketing where the struck product encompasses most but not all of a retailer's product, this too is a risk not different in principle from that which the Court recognized and accepted in *Tree Fruits*.[7]

C. The Court in *Tree Fruits* did not claim explicit Congressional approval of the struck goods/total boycott distinction. To the contrary, the Court recognized that "this distinction was [not] expressly alluded to in the debates." (377 U.S. at 64). Rather, the Court's premise was that, because of the caution stated in § 13 of the Act and because "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment" (*id.*, at 63), it would be inappropriate "to ascribe to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' • • • that Congress intended to do so as regards the particular ends of the picketing under review." (*Id.*, at 63, quoting *Labor Board* v. *Drivers' Union*, 362 U.S. 274, 284.) The premise that constitutional considerations dictate caution in attributing to Congress an intent to proscribe peaceful picketing has been greatly reinforced rather than undermined in the years since *Tree Fruits* was decided. (See parts II & III *infra.*) Consequently, absent the surfacing of some piece of explicit legislative history which was ignored in *Tree Fruits*, the conclusion of that case that Congress did not intend to proscribe

[7] For this reason the Board's argument, invoking *Radio Officers* v. *Labor Board*, 347 U.S. 17, 45, that it may infer that the Union's objective was to shut off business entirely between Safeco and the title companies (Bd. Br. 14-15 & n. 10) merely repeats the discredited theory of the NLRB's *Tree Fruits decision.* (See 132 NLRB 1172, 1177-1178 reversed 377 U.S. 58.)

consumer picketing limited to a struck product stands as correct.

The Board points to two statements in Congress, one in the House and one in the Senate, which, it claims, illustrate a *particular* intent to proscribe predominant product picketing. (Bd. Br., 17). Neither demonstrates such an intent.

The import given to Congressman Griffin's statement escapes us entirely. Nothing in Congressman Griffin's colloquy with Congressman Brown (105 Cong. Rec. 15672-15673) refers expressly to a situation "where consumer picketing, *though confined to the struck plant*, nonetheless calls for a boycott of the neutral's total business." (Cf. Bd. Br. 17, emphasis added.) Indeed, there is no suggestion at all that the picketing described in that colloquy would be limited in its appeal to the struck product, much less that the struck product would also be the predominant product of the retailer. In fact, Congressman Griffin's statements there necessarily add nothing to the Board's case since he stated, not once but three times, the limitation that consumer picketing would be proscribed only "*if* the purpose of the picketing is to coerce or restrain the employer of that second establishment." Thus what is significant about this colloquy is that the co-sponsor of the bill was three times offered the chance to say, unconditionally, that all secondary consumer picketing was outlawed by his proposal—and he three times turned that chance aside. Only "*if*" the picketing were aimed at "coercing" the secondary employer would it be proscribed.

As to Senator McClellan's John Deere plow example (105 Cong. Rec. 6667), the court below noted:

> The Senator's statement indicates he was concerned with picketing aimed at disrupting the merchant's busi-

ness generally, not with a narrowly focused consumer boycott of the struck product. 105 Cong. Rec. 6667 (1959). For a similar understanding of the Senator's remarks, see *Tree Fruits, supra* note 32, 377 U.S. at 65-66, * * * [Pet. App. 28a, n. 85.] [8]

Thus the *Tree Fruits* Court's understanding that "the legislative history does not support the Board's finding" of a violation (377 U.S. at 71) is as applicable here as it was in that case.[9]

D. The Board's Brief goes on at length in an attempt to

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[8] It bears noting as well that Senator McClellan's remarks were with regard to his own proposed amendment to § 8(b)(4), which was worded quite differently from the final version. Specifically, his proposal was not limited, as is § 8(b)(4)(ii) as enacted, to activity to "threaten, coerce or restrain"; rather, it reached activities designed "to exert or attempt to exert any economic or other coercion against, *or offer any inducement to*" neutral employers. (105 Cong. Rec. 5970; emphasis added). Peaceful consumer picketing which decreases sales of a given product could well be termed an "inducement" to drop that product even though it is not properly termed "coercion." Thus, Senator McClellan's remarks are not really pertinent at all to the bill as finally enacted.

[9] The legislative history set out in Safeco's lengthy Appendix similarly does not detract either from the conclusion that *Tree Fruits* must be read to cover this case, or from the *Tree Fruits* result itself. Other than the McClellan and Griffin remarks discussed above, only Congressman LaFare's discussion, 105 Cong. Rec. 3511) refers directly to the situation where "the distributor handles only one line of fixtures". (Safeco Br. 9a.) That discussion, however, did *not* concern consumer picketing but, rather, a situation in which unions advised a secondary employer "that they will be *courting labor trouble* if they continue to use * * * fixtures made by the manufacturer who is having a labor dispute * * *". (*Id.*; emphasis supplied). And, Congressman LaFare, like Senator McClellan, was discussing not the language eventually adopted but a proposal not enacted which specifically forbid "picketing * * * where an object is * * * causing * * * any employer * * * to cease doing business with any other person." (105 Cong. Rec. 3510)

show that the decision below "is inconsistent with the same court's application of [*Tree Fruits*] in the 'merged product' situation." (Bd. Br. 18; see *id.* at pp. 18-20.) We do not fully understand the point made since the Board and lower court "merged product" decisions are not binding on this Court. But, in any event, Judge Robinson patiently and tellingly explained the "ready" distinction between this and the merged product cases:

> There is a decisionally-significant difference between a secondary employer's sales of a struck product in the form in which it leaves the primary employer, and sales by the secondary employer of goods or services into which the struck product has been so integrated as to lose its separate identity for all practical purposes. In the former situation, the primary employer and the secondary retailer cater to the same body of eventual consumers; the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory. When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the primary employer and the secondary retailer no longer deal in the same product and share a common market. The struck product no longer has a market of its own, and it cannot be pursued into the market for the merged product without implicating its other components. The stark fact of the matter is that a discrete consumer boycott of the struck product, given its newly-acquired character, is simply not possible. See [137 U.S. App. D.C.] at 4, 401 F.2d at 955.

The decided cases vividly illustrate the contrast. In *Honolulu Typographical,* restaurant customers acceding to the union's supplication would have had to boy-

cott meals—products, of course, not supplied by the primary employer, the newspaper. Similarly, in *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969), in order to boycott a struck product—bread—customers of picketed restaurants would have had to pass up meals that included bread, thus effectively spreading the boycott to products not encompassed by the dispute with the primary employer. In that case at bar, however, consumers were neither required nor requested to boycott any neutral product in order to honor the picketers' appeal. Neutral secondary employers are legally susceptible to consumer picketing under *Tree Fruits,* but only insofar as the boycott of the struck product does not spill over into other phrases of the secondary enterprise. In true merged-product cases, however, the notion that the struck product is being followed to the consumer becomes so tenuous as to lose touch with reality. *Honolulu Typographical Union 37* v. *NLRB, supra* note 70, 131 U.S. App. D.C. at 4. 401 F.2d at 955. [Pet. 31a-32a, n. 93.] [10]

Aside from repeating its argument below the Board's response is:

> [A]s shown above (pages 18-19), the statutory purpose of preventing a picketline appeal for a total boycott of the neutral's business can be thwarted as readily where the struck product retains its market as it can where it merges with another product to create a new market. Accordingly, the distinction drawn by the court below is irrelevant for purposes of Section 8(b)(4)(ii)(B). [Bd. Br. 20-21, n. 15.]

This response assumes the point at issue in this case—*viz.* whether Congress intended to ban a picket line appeal that causes a retailer to drop a prodominant product as a poor seller. (Compare *Tree Fruits,* 377 U.S. at 73.)

E. Without giving even lip service to the doctrine of *stare decisis,* Safeco urges that *Tree Fruits* "Should Be Reconsidered" (Safeco Br., 15; Heading), a soft euphemism for "overruled."

The Company argues, first, that "if anything is clear from the legislative history, it is that Congress intended to prohibit all secondary picketing." (Safeco Br., 16.) We submit that what is "clear" from the majority and dissenting opinions in *Tree Fruits* is that there is no direct evidence that the sponsors of what became the § 8(b)(4)(ii) intended to prohibit picketing directed solely at a struck product, and that reasonable men may differ as to whether such an intention could otherwise be discerned in the legislative history. As just noted, Safeco's lengthly exegesis on the legislative materials (Safeco Br. 1a-23a) adds nothing to the materials discussed in detail in the *Tree Fruits* opinions; and the Company does not acknowledge, much less do business with, the principles of construction that informed the Court's consideration of those materials. In sum, there is no more reason for the Court to revisit the issue of statutory interpretation which was so fully debated in *Tree Fruits* than there would be for reexamining

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[10] So too, in *Bennett* v. *Teamsters Local 456,* 459 F.Supp. 223 (S.D. N.Y.) the District Court in granting an injunction against consumer picketing because of its understanding that § 10(l) limited its role to determining whether there is "some significant possibility that the picketing here did violate the Act" did not decide whether the Board or the Court of Appeals had been correct in *Dow Chemical.* That court did, however, expressly "reject the Board's contention that Carvel's [the primary employer's] products are so 'merged' with the products of other supplies that the picketing here could not be confined to the struck product as was the picketing in *Tree Fruits*" and on that basis stated the case to be "unlike *American Bread Company* v. *NLRB* (6th Cir. 1969) 411 F.2d 147." (See 459 F. Supp. at 231, n. 17.)

any other precedent in which this Court has been divided over an issue of statutory interpretation.

Safeco's second point is "that it is extremely difficult to apply the *Tree Fruits* distinction in the real world of labor disputes." (Safeco Br. 16) In support of that assertion the Company cites *Dow Chemical, supra,* and the merged product cases such as *American Bread, supra.* But, as we have developed herein, there is no valid distinction in terms of the principle stated in *Tree Fruits* between the factual situation presented in *Tree Fruits* and that presented in *Dow* and the present case. In contrast, as Judge Robinson demonstrated below, in terms of the *Tree Fruits* principle consumer picketing directed against a merged product is different from the picketing here. And, of course, the Board's misunderstanding of *Tree Fruits* can not impeach that decision. Nor can the assumption that the opinion is susceptible to alternative interpretations; that is true of many, if not most, judicial opinions. It is also the norm, and thus not a basis for reconsideration, that a single precedent does not provide an automatic solution for every related problem that may arise, and that when a decision construing a statute draws a line, some conduct will be on one side of that line and therefore lawful and some conduct will be on the other and unlawful. (Cf. *General Electric, supra,* 366 U.S. at 674: "However difficult the drawing of lines more nice than obvious, the statute compels the task.").

Lastly, Safeco argues at considerable length that "Secondary Consumer Picketing Inevitably Calls for a General Boycott of the Neutral" (Safeco Br. 17; Heading), stating that "a union picket line, without regard to the language of the picket signs, is an overt call not to cross the picket line" (*id.* at 18). For this assertion regarding "the realities

of union picketing" (*id.* at 17) Safeco cites no empirical studies, but only the views of three law review commentators (*id.* at 18 n. 17). The NLRB, on the other hand, recognizes that the language on a picket sign *is* significant. Thus, for example, one of the familiar *Moore Drydock* standards for lawful picketing at a common situs is that "the picketing discloses clearly that the dispute is with the primary employer." (*Sailors' Union of the Pacific,* 92 NLRB 545, 549.) Nor has the Board stated, in its original *Tree Fruits* decision or subsequently, that *consumers* do not take picket signs at face value, but read all of them as an invitation not to enter the premises. In *Tree Fruits* the Board's theory of illegality was that persuading customers not to purchase non-union apples would result in a decision by the retailers not to purchase those apples from the struck employees (See 132 NLRB 1172, 1177.) We submit that the assumption that persons reading a picket sign will treat it as meaning something different from what it says is entirely too arbitrary to be a basis of judicial decision, let alone for overruling the precedent established by this Court in *Tree Fruits.*

II

§ 8(b)(4)(ii)(B) AS CONSTRUED BY THE BOARD CONTRAVENES THE FREE SPEECH/EQUAL PROTECTION PRINCIPLE ESTABLISHED BY THIS COURT'S DECISIONS

Mr. Justice Black concurred in the judgment of the Court in *Tree Fruits,* not on the statutory ground stated in the majority opinion and just discussed, but on the ground that forbidding "striking employees of one business to picket the premises of a neutral business where the purpose of the picketing is to persuade customers of the neutral business not to buy goods supplied by the struck employer * * * abridges freedom of speech and press in violation of the First Amendment." (377 U.S. at 76.) He reasoned:

> [I]t is difficult to see that the section in question intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment. * * *
>
> The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom the picketers have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind of labor dispute and cannot be sustained as a permissible regulation of patrolling. Cf. *Carlson* v. *California,* 310 U.S. 106, 112.
>
> Nor can the section be sustained on the ground that it merely forbids picketers to help carry out an unlawful or criminal undertaking. Compare *Giboney* v. *Empire Storage & Ice Co., supra.* * * * [I]t is clear that the object of the picketing was to ask Safeway customers to

> do something which the section itself recognizes as perfectly lawful. Yet, while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing—solely on the ground of the lawful information they want to impart to the customers.
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> [I]t is clear that the object of the picketing was to ask Safeway customers to do something which the section itself recognizes as perfectly lawful. Yet, while others are left free to picket for other reasons, those who wish to picket to inform Safeway customers of their labor dispute with the primary employer, are barred from picketing—solely on the ground of the lawful information they want to impart to the customers. [377 U.S. at 78-79.]

Justice Black returned to the same point in his concurring opinion in *Cox* v. *Louisiana,* 379 U.S. 559:

> The Louisiana law against obstructing the streets and sidewalks, while applied here so as to convict Negroes for assembling and picketing on streets and sidewalks for the purpose of publicly protesting racial discrimination, expressly provides that the statute shall not bar picketing and assembly by labor unions protesting unfair treatment of union members. * * *
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> * * *
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> [B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the

> streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment. [379 U.S. at 580-581.]

Police Department of Chicago v. *Mosley,* 408 U.S. 92, brought to this Court another regulation which distinguished between picketing by labor unions and picketing by others. The *Mosley* Court, in an opinion by Mr. Justice Marshall, invalidated the Chicago ordinance in question because:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * * To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. * * *
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the fields of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assemblying or speaking on the basis of what they intend to say. Selective exclusions from a

> public forum may not be based on content alone, and may not be justified by reference to content alone. [408 U.S. at 95-96.]

The Court quoted the portion of Mr. Justice Black's concurring opinion in *Cox* set out above (at p. 33) and stated "We accept Mr. Justice Black's quoted views. Cf. *NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 76 (1964) (Black, J., concurring)."

As Mr. Justice Powell explained in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 215:

> This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it. See, *e.g., Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488-489 (1955). This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Moseley,* 408 U.S., at 95. Thus, "under the Equal Protection Clause, not to mention the First Amendment itself," *id.,* at 96, even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions. See also *Cox* v. *Louisiana,* 379 U.S. 559, 581 (1965) (opinion of Black, J.). Cf. *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

Finally, in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, which involved "a state criminal statute that forb[ad] certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals" (*id.* at 767), Mr. Justice Powell, again speaking for the Court, reaffirmed:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended. [435 U.S. at 784-786; footnotes omitted.]

And in considering and rejecting Massachusetts' argument that the provision "protect[ed] corporate shareholders, an interest that is both legitimate and traditionally within the province of state law" (*id.* at 792), the Court added:

> The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates . . . that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduate income tax amendment." Brief for Appellee 6.
>
> Nor is the fact that § 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations.

> Minorities in such groups or entities may have interests with respect to institutional shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8. [435 U.S. at 792.]

This line of authority requires the conclusion that § 8(b)(4)(ii)(B) as construed by the Board impermissibly singles out for interdiction peaceful picketing by unions asking members of the public not to buy a disfavored product carried by a retailer *from the same activity at the same place by any other organization.* For this prohibition is discriminatory in two respects. First, there is nothing in reason, experience, or the legislative record that demonstrates that such picketing by unions has different consequences from picketing by everyone else. Second, the Section does *not* cover those *selling* the product, leaving them free to use every form of persuasion, including such comparable advertising techniques as large signs affixed to the premises, to convince shoppers to buy. The principle stated by Mr. Justice Black in *Tree Fruits* itself, adopted by the Court in *Mosley* and elaborated in *Bellotti* squarely precludes such discrimination.

Even though Justice Black's *Tree Fruits* opinion makes it plain that the free speech/equal protection principle is the first Constitutional requirement that the Board's order here must pass and despite our reliance below on *Mosley* and its progeny, Safeco's elaborate argument on the Constitutional phase of this case does not even acknowledge that principle. And the Board's sole response to *Mosley* is that:

> [T]he Court [there] held that no valid legislative purpose was served by broadly prohibiting all picketing near schools, while exempting peaceful labor picketing, since there was no basis for the city's claim that nonlabor picketing is more apt to produce violence than labor picketing (408 U.S. at 100-102). Here, by contrast, there is a valid legislative purpose in prohibiting unions from using secondary boycotts to enmesh neutrals in labor disputes not their own. The First Amendment, of course, "does not command 'that people who want to [voice] their views have a constitutional right to do so whenever and however and wherever they please.' " *Madison School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 178 (1976) (concurring opinion of Mr. Justice Brennan), quoting *Adderley* v. *Florida,* 385 U.S. 39, 48 (1966). [Bd. Br. 24-25; footnote omitted.]

But *Madison School District* follows *Mosley* and supports our position.[11] The Chief Justice's opinion for the Court recognizes:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and head the views of citizens, it may not be required [by the State] to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972). [429 U.S. at 175-176; footnotes omitted.]

[11] In *Madison School District:*

> The question presented [was] whether a State may constitutionally require that an elected board of education prohibit teachers, other than union representatives, to speak at open meetings, at which public participation is permitted, if such speech is addressed to the subject of pending collective-bargaining negotiations. [429 U.S. at 169.]

That question was answered, "No".

Mr. Justice Brennan, in his concurring opinion, agreed with that point. The portion of his opinion quoted by the Board is part of his demonstration that: "[T]he Wisconsin Supreme Court was correct in stating that there is nothing unconstitutional about legislation commanding that in close bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees." (*id.* at 178.) Justice Brennan then went on to stress:

> But the First Amendment plays a crucially different role when, as here, a government body has either by its own decision or under statutory command, determined to open its decisionmaking processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public. "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972). [429 U.S. at 178-179; footnote omitted.]

No tenet of First Amendment jurisprudence is more firmly established than that the public streets fronting commercial establishments are a "forum opened up to assembly and speaking."

III

§ 8(b)(4)(ii)(B) AS CONSTRUED BY THE BOARD CONTRAVENES THE FREE SPEECH PRINCIPLES ESTABLISHED BY THIS COURT'S DECISIONS

The free speech/equal protection principle just discussed is, we believe, dispositive. But § 8(b)(4)(ii)(B) as construed by the Board violates the First Amendment, the anti-discrimination principle aside.

A. *Introduction*

In defending the constitutionality of the Board's construction of § 8(b)(4)(ii)(B) the briefs on petitioner's side base their case entirely on the fact that the subject of regulation in this case is picketing. But a prohibition justified by the "epithet" "picketing" like all such prohibitions based on "mere labels" such as "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business and the various other formulae for the repression of expression that have been challenged in this Court, can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (footnotes omitted).) For, as this Court recognized in *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 99:

> [P]icketing plainly involves expressive conduct within the protection of the First Amendment, see, *e.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Teamsters Union* v. *Newell,* 356 U.S. 341 (1958); *Garner* v. *Louisiana,* 368 U.S. 157, 185 (1961) (Harlan, J., concurring in judgment); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 at 546; (1965); *Food Employees* v. *Logan Valley,* 391 U.S. 308, 314-315 (1968); *id.,* at 337 (White, J., dissenting); *Gregory*

> v. *Chicago,* 394 U.S. 111, 112 (1969); *Shuttlesworth* v. *Birmingham,* 394 U.S. [147] at 155 (1969 * * *.

Moreover, while this Court has, as the Board observes, sustained injunctions against "picketing aimed at preventing effectuation of a constitutionally permissable legislative policy" (Bd. Br. 22, citing *Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284), the Court in that very case took pains to make clear that:

> Of course, the mere fact that there is "picketing" does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing [354 U.S. at 294-295]

It could hardly be otherwise, since, as the Chief Justice recently wrote for a unanimous Court:

> A legislature apppropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified. [*Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 844.]

Indeed, with a single exception, the cases on which the briefs on the other side rely involved picketing by unions which was addressed, in whole or in part, to *union members subject to union discipline* urging them not to enter a premises, not to perform services or not to make deliveries. Thus, for example, in *Giboney* v. *Empire Storage Co.,* 336 U.S. 490, the decision which *Vogt* termed the "decisive reconsideration" of picketing doctrine (354 U.S. at 281), the Court emphasized that

> Empire Storage and Ice Company['s] * * * place of business was * * * picketed by union members [whose] complaint registered against Empire, as indicated by placards carried by the pickets, was its continued sale of ice to non-union peddlers.
>
> * * *
>
> About 85% of the truck drivers working for Empire's customers were members of labor unions. These union truck drivers refused to deliver goods to or from Empire's place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member. [336 U.S. at 492-493.]

And the final paragraph of the *Giboney* opinion makes plain that it was this factor that persuaded the Court that there "was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [Missouri's anti-trust] policy a dead letter" (*id.* at 503), and "that appellants were doing more than exercising a right of free speech or press" (*id.*). Mr. Justice Black there concluded:

> Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. *The union has provided for enforcement of its rule by sanctions against union members who cross picket lines.* We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, businessmen or others. [336 U.S. at 504; emphasis added.]

The one case in this Court sustaining a ban on picketing directed to consumers is *Hughes* v. *Superior Court*, 339 U.S. 460. Because of our adversaries' heavy reliance on *Hughes*,

we shall discuss that decision in detail on pages 64 to 78, *infra*. It sufficies at the outset to recall that while they treat *Hughes* as if it resolved all questions regarding the constitutionality of bans against picketing addressed to consumers, that case concludes by noting:

> The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring [which California deemed an unlawful form of racial discrimination]. We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts. [339 U.S. at 469.]

That *caveat* is given point by the Court's most recent consumer picketing case, *Teamsters Union* v. *Newell*, 356 U.S. 341 (*per curiam*) which summarily reversed a state court ban on consumer picketing citing "*Thornhill* v. *Alabama*, 310 U.S. 88, 98 *Third.*" That portion of *Thornhill* begins:

> *Third.* Section 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor, the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. * * * The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the termi-

nology used in noting the public of the facts of the dispute. [310 U.S. at 98-99, footnotes omitted.]

And, of course, that restriction was declared "invalid on its face." (*Id.* at 101.)

Thus this Court has never upheld a total ban on peaceful picketing directed to the general public seeking support for an entirely lawful end. Nor should it do so now.

B. *Speech Concerning The Merits Of A Labor Dispute Is At The Heart Of The First Amendment's Protection*

In *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, the Court defined "speech at the heart of the First Amendment's protection" by quoting *Thornhill* and applying its lessons:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940).

The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse affect on the economy of the State. See n. 4, *supra.* The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement. [435 U.S. at 776-777.]

The paragraph in *Thornhill* following the one quoted in *Bellotti* specifies the "issues * * * embrace[d in] freedom of discussion" in a manner that speaks directly to the question presented in the instant case:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.,* 307 U.S. 496; *Schneider* v. *State,* 308 U.S. 147, 155, 162-63. See *Senn* v. *Tile Layers Union,* 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U.S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." [310 U.S. at 102-103.]

In Re Primus, 436 U.S. 412, adds the following insight:

> Appellant's letter of August 30, 1973, to Mrs. Williams [communicating an offer of free assistance by attorneys associated with ACLU] thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. See n. 32, *infra.*; cf. *Bates* v. *State Bar of Arizona,* 433 U.S., at 364; *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 779-780 (1976) (STEWART, J., concurring). As *Button* indicates, and as appellant offered to prove at the disciplinary hearing, see n. 9, *supra,* the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537 (1945). The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button,* 371 U.S., at 437, * * *. [436 U.S. at 431-432.]

In *Thomas* v. *Collins,* the effort to "persuade to action" upheld against state restriction was a "speech [whose] whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members." (323 U.S. at 533.)

Commercial activity generates not only a stream of goods and services but a series of significant social issues. Businessmen are both participants in the public dialogue and its subject. Their decisions—concerning such matters as collective bargaining, equal employment opportunity, the use and preservation of natural resources, the maintenance

of the environment, the location of facilities in one area of the country or another or in a foreign country, the doing of business with repressive regimes, support for or opposition to government action—directly and immediately affect each of us.

The precedents just reviewed make it plain that precisely because that is so, speech on these subjects, including speech designed to persuade to action, is "at the core of the First Amendment's protective ambit" (*Primus,* 436 U.S. at 424) and the "constitutionality of any prohibition * * * turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech" (*Bellotti,* 435 U.S. at 786).

C. *Speech May Not Be Restricted In Order To Protect The Economic Interests Of One Group From The Lawful Decisions Of An Informed Public.*

The precedents in this Court establish further that legislation does not meet the "exacting scrutiny" standard because it seeks to advance the economic interests of one group in the community by denying the general public truthful information concerning decisions the latter have the lawful right to make. The decisive decision is *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U.S. 748. The Court there began:

> Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U.S. at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the admin-

> istration of Government,' " *Roth* v. *United States,* 354 U.S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not. [425 U.S. at 762.]

After summarizing the "substantial individual and societal interests" (*id.* at 766) in the free flow of price information (see *id.* at 762-765), the Court surveyed the "justifications for the [price] advertising ban [at issue which] have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists" (*id.* at 766; see *id.* at 766-768). Those justifications were found to be constitutionally insufficient because "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance":

> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what. [425 U.S. at 769.]

This justification for a restriction on speech was deemed incompatible with the very essence of the First Amendment:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. [*Id.* at 770.]

As the Court was quick to add, "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown,* 317 U.S. 341 (1943)." (425 U.S. at 770.) Thus, *while the State can prohibit price competition,* it *cannot* permit businessmen an option between a low-price, limited-service policy and a high-price, full-service policy, recognize the consumer's freedom to choose between the two, and then attempt to further the interests of those who provide full-service at a high price by stemming the free flow of price information to consumers. However else the State may regulate commercial conduct, it may not do so by regulating free speech in order to insulate from the public's informed judgment the class of businessmen who select one of the options open under State law.

Indeed, as the Court recognized in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, the First Amendment does not "permit a municipality to prohibit the posting of 'For Sale' or 'Sold' signs when the municipality acts to stem what it perceives as the flight of white homeowners from

a racially integrated community" (*id.* at 86) although "[t]here can be no question of the importance of achieving [the] goals * * * [of] stable racially integrated housing" (*id.* at 94):

> The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. [431 U.S. at 96-97] [12]

The analysis in *Va. Pharmacy Bd.* began with the point "The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits

[12] See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350. (The "publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services * * * may not be restrained." (*Id.* at 384).)

of the dispute in order to influence its outcome." (425 U.S. at 762.) The Court also noted:

> The speech of labor disputants, of course, is subject to a number of restrictions. The Court stated in *NLRB* v. *Gissel Packing Co.*, 395 U.S. [575] 618, for example, that an employer's threats of retaliation for the labor actions of his employees are "without the protection of the First Amendment." [425 U.S. at 263, n.17.]

And, on that basis the Court there put to one side the "complex subject *** of restrictions upon speech in the special context of labor disputes". (*Id.*)

In *Gissel,* Chief Justice Warren had stated:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting *** [and] take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. [395 U.S. at 617.]

That statement provided the ground on which the rule quoted by the *Va. Pharmacy Bd.* Court rests. (The *Gissel* analysis foreshadows that of *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 "where [the Court] upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment *** [as] so inherently conducive to fraud and overreaching as to justify its prohibition" (*Schaumburg* v. *Citizens for Better Environ.* (No. 78-1335; Feb. 20, 1980) Sl. Op. p. 17, n. 11.)) [13]

[13] Safeco's argument that the message on a picket sign urging consumers not to buy a struck product is necessarily "misleading" (Safeco Br. 26) is wholly baseless (see pp. 30-31, *supra*). Accordingly

When picketing is addressed to union members who are subject to discipline if they fail to respect the picket line, the Court has employed the same analysis as in *Gissel* (See *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 493, 504 discussed at pp. 54-57, *infra*, which cites *Virginia Electric Co.* v. *Board*, 319 U.S. 533, 539 & *Thomas* v. *Collins*, 323 U.S. 516, 536, 537, 538, 539-540.) *Giboney* indeed quotes from the following passage in *Thomas* v. *Collins* very much in point here:

> [D]ecision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *** When to his persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. *** But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection. [323 U.S. at 537-538.]

Certainly then, *Va. Pharmacy Bd.*'s approach to the constitutional protection offered "speech which does 'no more

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even if the communication here is given no greater protection than commercial speech, the ban on picketing here cannot be justified on any "truth" test such as that permitted under *Bates* v. *Arizona State Bar Assn.*, 433 U.S. 350, 380 and as applied in *Friedman* v. *Rogers*, 440 U.S. 1, 12-16. And, if its protection is not so limited, the total answer is given by *Bellotti:*

> ***[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. *Wood* v. *Georgia* [370 U.S. 375,] 388. [435 U.S. at 791-792.]

than propose a commercial transaction' " (425 U.S. at 762) *does* apply to speech by a union informing the *general public* (over whom the union has no control) "on the merits of a [labor] dispute in order to influence its outcome" (*id.*).

In the light of these decisions § 8(b)(4)(ii)(B) as construed by the Board can not be validated under the First Amendment on the ground that the Government may protect "neutral" persons who choose to deal in struck goods from informed consumer decisions not to buy such goods. There can be no principled basis for attributing to the Government greater power to suppress attempts to inform the general public that Safeco Insurance is a struck product, coupled with a request not to buy, than to suppress information in order to preserve a racially integrated community (*Linmark*) or to protect "professional" pharmacists (*Va. Pharmacy Bd.*). Consumers who base their buying decisions on their judgment as to whether the seller's business practices are constructive or anti-social, like consumers who buy on the basis of the price or quality of the product, act entirely within their rights. The premise of *Va. Pharmacy Bd.* is that since the consumer has a right to choose he has a correlative right protected by the First Amendment to receive information pertinent to that choice. And, the Court there made it plain that this First Amendment right is not overcome by the state's concern that the informed consumer will make a choice that harms the commercial interests of certain competitors in a free market.

D. *An Appeal To Consumers Not To Buy a Struck Product Does Not Lose Its Constitutional Protection Because It Is Conveyed By Picket Signs*

1. We demonstrated in the preceding section that an appeal to consumers not to buy a struck product, or to take

some other action which they may lawfully do, is a communication protected by the First Amendment. The briefs on petitioner's side do not contest that proposition. Their arguments in support of the constitutionality of § 8(b)(4)(ii)(B) as construed by the Board in this case rest entirely on the fact that, as so construed, Congress has prohibited the communication of that message to consumers only by picketing. If this Court had held, for any reason, that picketing is not entitled to the protections of the First Amendment, that argument would, of course, be decisive. But this Court has never so held. (See pp. 40-44, *supra*.)

As we also noted there, *Giboney* v. *Empire Storage Co.*, *supra*, 336 U.S. 490, is the leading case in the line of authority which sustained certain regulations of picketing. In rejecting the contention that the picketing could not constitutionally be enjoined "because the picketers were attempting peacefully to publicize truthful facts about a labor dispute", (*id* at 497-498) Justice Black stressed that:

> [T]he record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.
>
> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants [e.g. *Thornhill*] calls for a different holding. [336 U.S. at 498]

Later in his opinion, Justice Black reiterated that the conclusion the Court reached was in accord with well-established First Amendment principles:

> We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges* v. *California*, 314 U.S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider* v. *State*, 308 U.S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co.* v. *Board*, 319 U.S. 533, 539; *Thomas* v. *Collins*, 323 U.S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas* v. *Collins*, *supra*, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated,

> evidenced, or carried out by means of language, either spoken, written, or printed. See *e.g., Fox* v. *Washington,* 236 U.S. 273, 277; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. [336 U.S. at 501-502]

In sum, the determination that the picketing was not constitutionally protected rested on a combination of two factors: First, the picketing sought two classes of illegal acts—Empire's violation of Missouri's criminal law prohibiting restraints of trade and the participation of union members in the same conspiracy.[14] Second, the picketing was addressed to union members who were subject to loss of their membership if they did not honor a picket line. (See *id.* at 493 & 504 quoted at pp. 41-42, *supra.*) While the illegality of the objective was necessary to the constitutional result, it was not sufficient. For, if the union members had not been subject to discipline for crossing a picket line, there would not have been "clear danger, imminent and immediate, that unless restrained [the union] would make [Missouri's] policy a dead letter insofar as purchases by non-union [peddlers] from Empire and other distributors was concerned. (*Id.* at 503). Mr. Justice Black would not have tolerated an infringement of speech on any lesser

[14] Of course, one unlawful object is sufficient, if the appeal by its nature meets *Giboney's* clear, imminent and immediate danger test. But it sharpens analysis of *Giboney's* progeny to bear in mind that the objective may be unlawful because it induces employees to engage in an illegal strike, or because its ultimate object is to require a third person to engage in an illegal act.

showing.[15] On the other hand, on the principle stated in *Giboney* if it had been lawful for the union members to concertedly refuse to deliver goods to or from Empire's place of business and for Empire to refuse to deal with the non-union peddlers, there would have been no constitutional justification for prohibiting an instruction to that effect. On that principle the Board's order here can not stand. For it is entirely lawful for consumers to refuse to buy a struck product and for retailers to refuse to carry such a product.

2. In the Term following *Giboney,* "the Court decided a group of cases applying and elaborating on the theory" of that decision (*Vogt,* 354 U.S. at 292). The trilogy of 1949 Term cases (*Hughes* v. *Superior Court,* 339 U.S. 460; *Teamsters* v. *Hanke,* 339 U.S. 470; *Building Service Union* v. *Gazzam,* 339 U.S. 532) established that the constitutionality of a regulation of picketing does not depend on whether the objective against which the picketing is directed is declared to be illegal by the legislature or the courts, or whether it is enforced by criminal or civil sanctions. These elaborations were not based on the view that

[15] The citation of *Bridges* v. *California,* 314 U.S. 252, 263, in the portion of *Giboney* just quoted is particularly significant, for Justice Black there stated:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. [Footnote omitted.]

picketing is entitled to a lesser status under the First Amendment than other means of communication. (See *Hughes,* 339 U.S. at 466-467; *Gazzam,* 339 U.S. at 540.) And neither those decisions nor any others through *American Radio Assn.* v. *Mobile S.S. Co.*, 419 U.S. 215, purported to undertake a doctrinal reevaluation of *Giboney.* Nevertheless, these cases expanded the scope of government authority to regulate picketing.

In understanding and evaluating this development, it is informative, we believe, to note the following hierarchy. Picketing, like any other form of speech, can be used to request its audience: (1) to commit an unlawful act that results in placing economic pressure on a third person to commit an additional act that is also unlawful; (2) to commit an unlawful act that results in placing economic pressure on a third person to commit an additional act that is lawful; (3) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is unlawful; (4) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is lawful but against a public policy; (5) to commit a lawful act that results in placing economic pressure on a third person to commit an additional act that is lawful and is not against any public policy. The first of these describes *Giboney;* the three intermediate examples state the fact situations that have been confronted by the Court in its post-*Giboney* decisions; and the last is the instant case.

A finding of a violation in the first two situations noted, fits within normal First Amendment doctrine, as *Giboney* shows. The next three variations, however, present considerably greater perplexities. It is entirely mysterious to us, for instance, why the government should be able, con-

sistent with the First Amendment, to ban speech asking consumers not to deal as is their right with an employer who employs few minorities or is non-union on the theory that to do so is to permit the speaker to unlawfully coerce the employer into denying his employees their *right* to non-discriminatory treatment (or free choice of a representative) *if* the employer may, of his own volition, deny those "rights" and the law gives those employees no remedy. That, we submit, is to use the terms "unlawful object", "employee rights" and "public policy" in a highly ideosyncratic manner to mask a deprivation of free speech in order to protect the interests of the employer. (Compare *Va. Pharmacy Bd., supra.*)

But, be that as it may, it is perfectly plain that to extend the *Giboney* theory to the fifth situation—which is the instant case—is to violate the Chief Justice's reminder in *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 127:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

And by doing so to sanction the absolute ban on picketing rejected in *Thornhill* and *Newell.* Against this background we consider the post-*Giboney* cases.

In *Hughes* v. *Superior Court* picketing of a store was designed to cause a consumer boycott which would compel the store owner to institute a racial quota hiring policy that was illegal under the California Supreme Court's decision in

James v. *Marinship Corp.*, 25 Cal.2d 721, 155 P.2d 329 & *Williams* v. *International Brotherhood of Boilermarkers*, 27 Cal.2d 586, 165 P.2d 903.[16] This Court's opinion in *Hughes*, quoted at length from the California Supreme Court's opinion in the same case, enlarging upon *Marinship:*

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, *supra* (25 Cal.2d 721, 737, 745). The fact that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object." 32 Cal.2d at 856, 198 P.2d at 889. [339 U.S. at 463-464.]

The *Hughes* opinion does not state whether California's policy against quota hiring was enforceable by any sanctions, civil or criminal. In one passage the Court says that the State could enjoin picketing to compel violation of that

[16] In *Marinship* the California Supreme Court held:

> [T]hat a union which holds a closed shop contract or other form of labor monopoly must admit Negroes "to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enofrcing the closed shop agreement against them" * * * [and issued a] judgment awarding a preliminary injunction which "was clearly intended to do no more than eliminate discrimination upon the basis of race, and color alone". [25 Cal. 2d at 730, 745].

policy by the employer even though it does "not forbid the employer to adopt such a quota system of his own free will." (*Id.* at 468.) [17] *Hughes* was therefore read by Professor Cox as stating:

> Picketing may be prohibited where its objective is "unlawful" in the sense that the employer's capitulation would result in violation of a public policy declared either by the legislature or the courts. This is the clear holding of the *Giboney, Gazzam* and *Hughes* cases, and it appears to command unanimous acceptance from the Court. Nothing to the contrary was decided by earlier precedents. [Cox, *Strikes, Picketing and the Constitution*, 4 Vand.L.Rev. 574 (1951)] [18]

Of the post-*Hughes* cases our adversaries rely heavily on *Electrical Workers* v. *Labor Board*, 341 U.S. 694, 705 (*Langer*), the previous First Amendment case involving the secondary boycott provisions of the NLRA.[19] *Langer* sustained the constitutionality of a ban on picketing which

[17] If that is what *Hughes* decided it was an unacknowledged expansion of *Giboney*. We note, moreover, that in discussing the sentence in which this passage appears, we show *inter alia* that the propositions stated therein were not supported by any decisions interpreting the First Amendment, see p. 76, *infra*.

[18] In *Gazzam*, the Court said:

> Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the State. That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. [339 U.S. at 540.]

In describing a third case decided on the same day, *Teamsters Union* v. *Hanke*, 339 U.S. 470, Professor Cox stated that *"Hanke* appears to hold that picketing may be enjoined where the use of organized economic power against weaker members of the community will have undesirable social and economic ecnsequences. But

sought to induce members of building trades unions to strike against their own employer in order to compel him to cease doing business with another employer. As the Court held in the companion *Denver Building* case, which was followed on this point in *Langer* (341 U.S. at 699-700) "a strike with such an object was an unfair labor practice within the meaning of 8(b)(4)(A)".[20]

Thus, the Court rejected the First Amendment claim:

> The substantive evil condemned by Congress in 8(b)(4) is the secondary boycott and we recently have recognized the constitutional rights of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise. [341 U.S. at 705, omitting n. 10 which cited *Giboney* and the 1949 Term trilogy.][21]

In the 1951 article previously quoted, Professor Cox stated also:

> It is still unsettled whether picketing may be forbidden when its objective is "unlawful" only in the Pickwickian sense, that although there is no policy opposed to the union's attaining its objective by other means, the court (or legislature) deems it insufficient

since only three justices joined with Mr. Justice Frankfurter in the prevailing opinion, the issue may still be open." (4 Vand.L.Rev. at 599.)

In *Hanke*, the union's objective was to compel a self-employed person to join the union, contrary to the policy of the State of Washington as declared by its State court. Three of the eight Justices participating considered the case to be distinguishable from *Giboney* and would have held the ban on picketing to be unconstitutional. They may well have been right. The constitutional standard which Justice Frankfurter applied in the prevailing opinion is plainly contrary to that declared by other cases for determining the constitutionality of a restraint on communication. See p. 77, *infra*. But if the statutory or common law of Washington forbade concerted refusals to work in order to compel a self-employed person to join a union (as does § 8(b)(4)(A) of the NLRA, to which *Hanke* referred (*id.* at n. 5), then picketing to induce union members to refuse to make deliveries or to pick up from such an employer could constitutionally be prohibited. While the Washington Supreme Court did not declare that such concerted refusals are unlawful, such a rule would appear to be implicit in the State's policy, as declared in *Hanke*, to protect such employers.

[19] Bd. Br. 22; Safeco Br. 29; C. of C. Br. 14, 16.

[20] *Labor Board* v. *Denver Building Council*, 341 U.S. 675, 689. Under the 1959 amendments, former § 8(b)(4)(A) is now set forth, in this respect, in § 8(b)(4)(B).

[21] In *Plumbers Union* v. *Graham*, 345 U.S. 192, the object of the picketing was for the purpose of compelling a general contractor to eliminate non-union men from a construction job, although Virginia's right to work statute "provides in substance that neither membership nor non-membership in a labor union shall be made a condition of employment * * * and that a person denied employment because he is either a member of a union or not a member of a union shall have a right of action for damages". *Graham*, 345 U.S. at 200, quoting *Finney* v. *Hawkins*, 189 Va. 878, 880, 54 S.E. 2d 872.

In *Teamsters Union* v. *Vogt, supra*, the picketing had been found by the Wisconsin Supreme Court to be for "an unlawful purpose" because the state statute "made it an unfair labor practice in concert with others, to 'coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights . . . or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.' " (354 U.S. at 286-287.)

In *American Radio Assn., supra*, the state had a policy against "unlawful interference" with an employer's business which this Court observed was "analogous to the federal policy of prohibiting secondary boycotts, and is based on similar considerations". (419 U.S. at 231.) (See also the opinion of the Alabama Supreme Court, 291 Ala. 201, 210-213; 279 So.2d 467, 475-477, particularly its quotation of *Superior Derrick Corporation* v. *National Labor Relations Board*, 273 F.2d 891, 897, 2506 (C.A. 5), which holds that the NLRA's prohibition against secondary boycotts includes concerted work stoppages by employees of neutral employers (see Bd. Br. 21, Safeco Br. 19).

> to justify injuring the employer's business and causing loss and inconvenience to the public.[22]

As we have emphasized, there is no law or public policy which is opposed to a retailer's refusal to sell a struck product. Nor is there any law or public policy against consumers' refusing to buy a struck product. Thus, the picketing here can be found to be for an "unlawful" object only in the Pickwickian sense, questioned by Professor Cox, and which, as we have shown, is wholly foreign to the First Amendment.

3. The second reason that picketing in this case is constitutionally protected is that it was addressed solely to the general public.

a. *Hughes* v. *Superior Court, supra* is the only case which has sustained an injunction against picketing which was not addressed, at least in part, to organized workers. Of course, the Court was aware of that difference between *Hughes* on the one hand and *Giboney* and the two labor picketing cases which were decided together with *Hughes*. Justice Frankfurter's opinion for the Court, however, did not distinguish between picketing addressed to employees and picketing addressed to consumers. Rather, that opinion contains certain statements characterizing picketing generally. Since our adversaries' argument for constitutionality rests largely on these statements, we shall analyze their meaning and validity at some length. At 339 U.S. 465, quoted at Safeco Br. 18-19, the following appears:

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences,

[22] 4 Vand.L.Rev. at 599.

> and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

That statement is accurate where picketing is addressed to union members who are subject to discipline as in *Giboney*. And it appears to have been the Court's perception that the situation in *Hughes* was indistinguishable because "At the time in controversy, about 50% of the customers of the Canal store were Negroes * * * [and] the Canal store was systematically patrolled by pickets carrying placards stating that Lucky refused to hire Negro clerks in proportion to Negro customers". (339 U.S. at 461.) These seem to have been the controlling facts to which Justice Frankfurter referred, at the close of his opinion. "We do not go beyond the circumstances of the case." (*Id.* at 469.) And we readily grant that the statement is accurate, too, whenever there is "a picket line" where by sheer force of numbers the pickets are likely to have an intimidating effect on consumers. But there is no basis whatsoever for the assumption that one or two individuals peacefully carrying placards addressed to consumers without blocking their entrance to a store evoke a loyalty or response which is not due to the verbal message of the placard.[23] It is particularly improper to indulge such an assumption to deny use of a chosen "mode[ ] of communication" (339 U.S. at 465). For, as the opinion in *Hughes* cautioned, "Generalizations are treacherous in the application of large constitutional concepts." (*Id.* at 469.) And *Hughes* was not intended to deny constitutional protection to all consumer

[23] Plainly, neither the Board's General Counsel nor Safeco presented any evidence that any of the prospective customers of the picketed land title companies were intimidated or overreached by the picket signs.

picketing, as is shown by *Teamsters Union* v. *Newell, supra,* 356 U.S. 341, in which the Court (including Mr. Justice Frankfurter) was unanimous.

b. Professor Cox, in the article referred to earlier, criticized the reasoning of *Hughes* and drew the distinction between picketing addressed to employees and picketing addressed to consumers in terms which, we submit, better portrays the realities of the situation, and contains a sounder constitutional analysis:

> But despite this common economic purpose of virtually all picketing, a sharp distinction between various kinds of picketing may be drawn according to (1) the basis of its appeal for support and (2) the character of the audience to which the appeal is addressed. Freedom of speech is an ideal born during the enlightenment out of the faith that men can progress by the use of reason if ideas are freely interchanged to be tested by debate and experience. Nor can we seek to judge between appeals to reason and bare slogans arousing prejudice or emotion. Much of our constitutional law grows out of this philosophy. Discussion may be curtailed if, but only if, a "clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." But if the speaker goes beyond discussion and invokes sanctions to support his words, he cannot claim the same constitutional protection. For this reason an employer may speak freely on labor questions but if he does not leave his ideas to seek approval on their merits and instead of this invokes fear of his economic power to induce obedience, the constitutional privilege is exceeded and the state may intervene. "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

It is from this standpoint that the term "peaceful picketing" covers too broad a range of conduct to have constitutional significance. The International Brotherhood of Teamsters has made wide use of its ability to shut off the flow of supplies into an establishment, or to stop the movement of its products, merely by posting a single picket at each driveway normally used by incoming or outgoing trucks. Other unions exercise similar power not by appealing to the public but because of the discipline of their members. The critical point, however, is not the success of such tactics but the fact that the union members respect the picket line because of a group discipline based partly on common loyalties, partly on the force of habit, partly on fear of social ostracism but also on severe economic sanctions. The truck driver who crosses a teamsters' picket line is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union may carry with it loss of employment. * * * In such cases picketing is not merely a method of self-expression or of securing publicity, nor are the pickets seeking to secure adherents by persuading others of the truth of what they have to say. The picket's reliance in such a case is on the sanctions inherent in the discipline and organized economic power of his union.

Quite different is the peaceful picketing which is directed primarily to the general public. Familiar illustrations may be found outside motion picture theatres, restaurants, and beauty parlors where none of the employees are on strike. Theoretically such a picket line is entitled to the same respect from union members as any other picket line, but as a practical matter the same economic sanctions play little part. Prospective patrons who are not union members are left free to determine their own course of conduct influenced but not coerced by the knowledge that a labor dispute is in progress.

In such cases, therefore, the success or failure of pickets' appeal depends primarily upon the persuasiveness of their message.

This distinction between picketing backed by the threat of economic punishment and picketing which appeals only to reason, loyalty and other emotions is paralleled by a difference in the audience which the pickets seek to reach. The Teamsters' picket line is rarely addressed to individual members of the public. Its primary, and often exclusive purpose is to notify union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods, because their unions are engaged in bringing economic weapons to bear on the employer. Despite its element of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power. The pickets patrolling in front of a retail establishment are also bringing economic pressure against the business—and in this respect the case is the same—but their appeal is addressed to the public and the members of the public decide chiefly as individuals whether to patronize the establishment or to support the pickets' cause. Thus the publicizing is the primary element and the disciplined economic power of the union is an insignificant factor.

In caricature the lines are always sharper than in life. The multitude of picketing cases falls between these two extremes in the range of activities covered by "peaceful picketing." The same picket line usually appeals both to public opinion and to group discipline backed by economic sanctions. The relative importance of the two appeals varies from case to case, presenting such nice questions of classification that from time to time the differences may be obscured. It is submitted, however, that the distinction is practicable and that the constitutional decisions in picketing cases should depend, in part, on whether the "publicity" or "signal"

aspect predominates. [Cox, *Strikes, Picketing and the Constitution, supra,* 4 Vand.L.Rev. at 593-595 (footnotes omitted).]

Professor Cox continued: " 'Signal picketing' is entitled to no greater constitutional protection than the combination it sets in motion". He observed that *Giboney, supra,* decided this precise point and expressly noted the Court's heavy reliance on *Virginia Electric Co.* v. *Board,* 319 U.S. 533, and *Thomas* v. *Collins,* 323 U.S. 516, see p. 52, *supra.* Professor Cox also criticized the *Hughes* opinion for failing to distinguish between "signal" and "publicity" picketing. (*Id.* at 595-597, 599-602).[24]

c. Safeco's brief (at 24) relies also on *Hughes'* reference to "the compulsive features inherent in picketing beyond the aspect of mere communication as an appeal to reason" (339 U.S. at 468).

If by the contrast between "compulsive features" and "appeal to reason" the *Hughes* Court sought only to exclude appeals which derive significant momentum from coercing the person or persons to whom the message is directed, that phrase, and the sentence in which it appears, are not inconsistent with First Amendment theory; they would then merely restate in summary fashion a basic point of the *Giboney* opinion and its approval of *Thomas* v. *Collins* and *Virginia Electric Power Co.* Whether on the facts in *Hughes* the picketing there was properly considered to have been coercive and in that sense a "signal" is, as we have said, questionable; but there is no finding by the Board, and no showing on this record, that the members of the general

[24] He also referred with approval to Justice Traynor's dissenting opinion in the Supreme Court of California in *Hughes,* which forcefully stated the same distinction. See *id.* at 596, n. 87.

public who were addressed by the picket signs in this case were coerced in any way—because they were in some relationship of the dependence to the union, because there were too many pickets or due to any other cause.

The contention on petitioners' side is rather that all picketing is inherently coercive. Neither *Hughes* nor any other decision of this Court has held that this is so. Indeed, to hold that all picketing inevitably has compulsive features which outweigh its use as a means of communicating ideas would be to hold, on the view of the First Amendment discussed in this paragraph, that no picketing is entitled to constitutional protection. But to do so would be no more justifiable than to hold that because some speeches by employers to their employees are unprotected by the First Amendment, "tak[ing] into account the economic dependence of the employees on their employers" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 617), Congress may outlaw all such speeches.

If *Hughes* states the general proposition that a communication loses First Amendment protection if it does not constitute "an appeal to reason" then the opinion is contrary to both the earlier and later precedents in this Court. *Stromberg* v. *California*, 283 U.S. 359, struck down a provision of the California Penal Code which made it a felony to:

> display a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government. [*Id.* at 360.]

Chief Justice Hughes wrote:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. [*Id.* at 369-370.]

Although the display of a red flag as a symbol of peaceful and orderly opposition to government cannot be considered an appeal to reason in the sense of an elaborate political tract or in any other sense which distinguishes it meaningfully from a picket sign urging consumers not to purchase a particular product, display of the flag was deemed to be within the protection which the Fourteenth Amendment gives to the "opportunity for free political discussion". So too, in *Spence* v. *Washington*, 418 U.S. 405, the Court held that the First and Fourteenth Amendments protected the display of the American flag upside down and with a peace symbol attached to the front and back (see *id.* at 406) was "a form of protected expression".[25]

The analogy between communication by flags and by signs carried by pickets was expressly recognized in *Thornhill's* companion case, *Carlson* v. *California*, 310 U.S. 106, 112-113:

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[25] Four members of the Court dissented in *Spence*. Both of the dissenting opinions rest on the unique characteristics of the American flag as a symbol of national unity. (*Id.* at 416, Burger, C. J.; *id.* at 423, Rehnquist, J.) Neither opinion expressed the view that the First Amendment was inapplicable, or that Spence's communication was entitled to less protection because it was only symbolic, and was not intended to evoke a reasoned response from those who saw the flag. Indeed, Justice Rehnquist's dissent would have sustained the state statute there in part because "Its operation does not depend upon whether the flag is used for communicative or non-communicative purposes." (*Id.* at 422).

> The carrying of signs and banners, no less than the raising of a flag is a natural and appropriate means of conveying information on matters of public concern. *Stromberg* v. *California*, 283 U.S. 359.

The placards in cases like this and *Tree Fruits* are no less "appeals to reason" than the "For Sale" and "Sold" signs which were constitutionally protected in *Linmark, supra,* (431 U.S. at 86.) Nor are they distinguishable in these terms from the placards, ubiquitous before election day, which announce: "Vote For X, Democratic Candidate for Y Office" perhaps with or without a picture of the candidate and/or a pithy characterization such as "honest, hard working, progressive". A prospective voter seeing such a sign is no more or no less informed about the election that a prospective purchaser of insurance would be informed about Safeco Title Insurance by the picket signs in this case. He (or she) will be persuaded to vote for "X" by reading such a placard if he is disposed to voting for the candidates of the Democratic Party, be it because of a life-long philosophic conviction, temporary pique at the Republican Party or some other ground.

So too, a prospective customer's favorable or unfavorable response to a picket sign requesting that he not purchase a particular product may depend on his "deeply held views on the role of organized labor in the free economic life of the Nation" (*cf. Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 99-100), or his feeling of identification with (or opposition to) the particular group which is urging the boycott or its cause, be it higher wages, employment opportunities for Americans, racial equality, lamb prices, opposition to the South African government, etc. In each instance, the individual's decision to honor or not to honor the request will depend on the views which he carries with him when he sees the sign.

Thus, it is psychologically unsound, aside from being constitutionally irrelevant, to assume that a picket sign arouses in all or even a vast majority of those who see it an identical stimulus, irrespective of the individual's prior experience and values. And it is our basic thesis that as long as the individuals remain free to choose whether to buy or not to buy particular products, the First Amendment disables government from insisting that they make their decisions in ignorance of that which they, for good reason or bad reason or none at all, consider to be relevant. And it likewise disables government from forbidding those who wish to peacefully communicate with the consumers from doing so because government disapproves of what the consumers will do or because it fears that they will make their decision without "reason."

For the reasons just stated the banner and "For Sale" sign cases are very much in point. But there is one decision of this Court which on its holding and because of the force of its reasoning establishes beyond dispute that a communication may not be denied full First Amendment protection on the rationale that it does not constitute an "appeal to reason". That case, of course, is *Cohen* v. *California,* 403 U.S. 15.

The holding of that case, that Cohen's "vulgar allusion to the Selective Service System" (*id.* at 20) was fully protected by the First and Fourteenth Amendment, should alone be dispositive, as a matter of precedent, on this issue. For Cohen's three-word message was surely no more of an "appeal to reason" than was the picket sign in this case or any similar appeal to consumers not to purchase a particular product, for example, because it is manufactured under non-union or substandard conditions. It is well, however, to quote at length from Mr. Justice Harlan's analysis

in support of the holding in *Cohen* because it provides a reasoned refutation of the thesis that rational discourse is the only communication which is entitled to full protection under the First Amendment:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California,* 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a triffling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as full as do Keats' poems or Donne's sermons," *Winters* v. *New York,* 333 U.S. at 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).
>
> Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.
>
> Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. [403 U.S. at 24-26.]

While we cannot improve upon the foregoing, we do wish to emphasize two points. The first is that Justice Harlan recognized that "words are often chosen as much for their emotive as for their cognitive force" and that their entitlement to constitutional protection is not thereby diminished. The second is that "no readily ascertainable general principle exists" whereby the legislature or the courts could distinguish "appeals to reason" from other communications

which are the antithesis of such appeals whether they be characterized as appeals to emotion, unreason, or reflex response. Indeed, it would be an extreme form of censorship for any organ of government to take it upon itself to determine that a particular message is, or is not, an appeal to reason, and therefore is, or is not, entitled to constitutional protection. And the making of such decisions by government is not less offensive to the First Amendment if it is made on the basis of blanket categorizations of a particular form of communication such as a picket sign.

There is an additional, more general ground why the "appeal to reason" formulation cannot be considered to be authoritative in this case: Mr. Justice Frankfurter did not cite any free speech decisions to support this portion of his opinion. The "appeal to reason" phrase appears as part of a sentence [26] in a paragraph that cites a series of cases which declare the broad power of state governments under the Equal Protection Clause of the Fourteenth Amendment to legislate one step at a time in *economic* regulation.[27]

Thus the *Hughes* Court did not subject the decision of the California Supreme Court "to the critical scrutiny demanded under accepted First Amendment and equal protection principles" (*Bellotti,* 435 U.S. at 786-787 quoting *Buckley* v. *Valeo,* 424 U.S. 1, 11). The decisions discussed

[26] "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will." (339 U.S. at 468.)

[27] See also *id.* at 468-469 citing *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 46 which demonstrates the same rule vis-a-vis the federal government under the due process clause of the Fifth Amendment.

in Part II of this brief made clear that this difference in constitutional standards is critical. (See particularly *Erznoznik,* quoted at p. 35, *supra.*)

It is clear that in *Hughes* Justice Frankfurter applied not that standard, but a different standard more restrictive of the exercise of free speech, *viz.* that legislation is constitutional under the due process clause of the Fourteenth Amendment if it is consistent with the concept of "ordered liberty" as declared in *Palko* v. *Connecticut,* 302 U.S. 319, 327. (See *Hughes,* 339 U.S. at 464.) Mr. Justice Frankfurter's approach is more fully articulated, in this respect, in his opinion for four justices in the *Hanke* case which was decided the same day:

> It is not for us to pass judgment on cases not now before us. But when one considers that issues not unlike those that are here have been similarly viewed by other States and by the Congress of the United States, we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution. [339 U.S. at 478-479, footnotes omitted.]

See also Justice Frankfurter's concurring opinion in *Kovacs* v. *Cooper,* 336 U.S. 77, 89-97 in which he rejects "the preferred position of freedom of speech" under the Constitution. Subsequent decisions in this Court have conclusively resolved this issue against Justice Frankfurter's views. But we need not pursue that controversy, because this case involves the constitutionality of an Act of Congress under the First Amendment as to which considerations of federalism do not come into play.

d. Central to Mr. Justice Frankfurter's approach to the

question of the constitutionality of regulations of picketing was, as the *Hughes* opinion shows, the fact that picketing is more than pure speech, and involves conduct as well. Subsequent decisions have established the following test which certainly was not applied in *Hughes*:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety ofdescriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; *if the governmental interest is unrelated to the suppression of free expression;* and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [*United States* v. *OBrien,* 391 U.S. 367, 376-377, footnotes omitted, emphasis added.]

Here, unlike *O'Brien,* the governmental interest to be advanced in support of § 8(b)(4)(ii)(B) as construed by the Board "involved 'suppressing communication'" (*Buckley* v. *Valeo,* 424 U.S. at 17 quoting *O'Brien.*) Thus, as in *Buckley,* the ban on picketing cannot be sustained on the ground that it involves conduct. Rather, it must be judged by the constitutional standard that is established in the modern First Amendment cases such as those just discussed in Point IIIC, *supra.* An integral part of that First Amendment law is stated in the "decisions [which] have fashioned the principle that the constitutional guarantees of free speech

and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (*Brandenburg* v. *Ohio,* 395 U.S. 444, 447). That is, as we have seen, the principle which was applied in *Giboney.* And since, in this case, the pickets did not advocate "the use of force or of law violation" but only a lawful decision by consumers not to purchase a product (so that, unlike *Giboney,* the picketing was not "directed to inciting or producing imminent lawless action"), the Board's order enjoining that picketing can not stand consistent with the First Amendment.

E. *Consumer Picketing Does Not Lose Its Constitutional Protection Because § 8(b)(4) Allows Other Methods For Communicating With The Public*

Both the Board and Safeco rely heavily on the fact that § 8(b)(4) does not outlaw appeals to consumers by means other than picketing. As this Court said in *Linmark,* this fact "is not without significance to First Amendment analysis, since laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether" (431 U.S. at 93). But as *Linmark* also illustrates, it is not a constitutionally sufficient ground for forbidding one means of communication that others are available. Rather, it must be demonstrated that the alternatives are not materially less effective forms of communication, and that the regulation is truly directed to time, place and manner rather than content. (See *id.* at 493-494.) Section 8(b)(4)(ii)(B), as construed by the Board, satisfies neither of these conditions.[28]

---

[28] Of the six cases cited at Safeco Br. 26-27 for the sweeping prop-

First, the distribution of handbills to potential customers

osition "that the presence of alternative means of communication may sanction governmental regulation of speech", only two sustain a ban on that basis.

In *Lloyd Co.* v *Tanner,* 407 U.S. 551, 566-567 the record demonstrated that moving the distribution of handbills to public sidewalks from a privately-owned shopping center did not interfere with the respondent's ability to communicate with members of the public, and it was obvious that doing so would safeguard the shopping center owner's property rights. Thus, the Court concluded: "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." In the present case, however, there is no demonstration that the distribution of leaflets would be equally effective to convey the union's message, and that picketing creates a unique interference with interests which Congress sought to protect. Moreover, as made clear in *Hudgens* v. *NLRB,* 424 U.S. 507, 517-521 the basic holding of *Lloyd* was that the First Amendment does not apply to a private shopping center at all.

In *Pell* v. *Procunier,* 417 U.S. 817, the Court sustained a regulation by the State Department of Correction which forbade "press and other media interviews with specific individual inmates" at the prison (see *id.* at 819). The prison context of the regulation was decisive:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser* v. *Rodriguez,* 411 U.S. 475, 492 (1973).
>
> In *Procunier* v. *Martinez,* [416 U.S. 396] we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as

"may be [a] less effective medi[um] for communicating the message that is conveyed by" the picket sign. This is not because, as Safeco argues, "picketing can accomplish something more than could be accomplished by pure speech alone" (Safeco Br. 27), but because a picket sign is easily seen and read by all who approach it. An additional advantage of a picket sign is that those who run may read. Handbills, by contrast, must be proffered individually, with the result that, at a busy location, the message will be communicated to only a small fraction of the potential consumers. To be sure, this difficulty could be overcome by having a large number of people hand out leaflets, but this would appear to be potentially more disruptive than a handful of

> security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude." *Cruz* v. *Beto,* 405 U.S., at 321.

In *Martinez,* by contrast, the prison authorities had made no showing that their censorship of prisoner mail was "necessary to protect one or more of the legitimate governmental interests (in penal administration) identified" by the Court. (416 U.S. at 414). Those criteria were the following:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. [Id. at 413]

pickets, as in *Tree Fruits*. Indeed a communication by picket sign rather than by handbill does not necessarily entail any interaction between the person seeking to convey the information and those to whom it is conveyed, and is in that sense a lesser intrusion on the potentially unwilling auditor.

Second, § 8(b)(4)(ii)(B) cannot be justified, any more than could the ordinance struck down in *Linmark*, as a "time, place or manner" restriction. Rather:

> [Congress] has proscribed particular types of [picket] signs based on their content because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. See, *e.g.*, *Erznoznik* v. *City of Jacksonville, supra; Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 510 (1969). If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and no on any interest in regulating the form. [431 U.S. at 94.]

A suggestion of a "secondary effect" (*id.*) may be implicit in the Board's approving quotation of the portion of the dissenting opinion below stating the view that "'Read as barring only pickeing urging [a] total consumer boycott, . . . the statute strikes narrowly at those 'inherently compulsive features' present when consumers must cross a line." (Pet. App. 40a n.1, quoting *Honolulu Typographical Union No. 37* v. *NLRB, supra*, 401 F.2d at 957 n.11)" (Bd. Br., 23) We believe that Judge Leventhal's opinion in *Honolulu Typographical* cannot properly be read as announcing the principle that all picketing addressed to consumers necessarily has "compulsive features". In that

case "The union set up a picket line of from thirty to sixty persons who marched (shoulder to shoulder) in an ellipse across the front entrance to Market Place". (401 F.2d at 953.) Applying the merged product doctrine, discussed earlier herein, that court there said: "The only realistic meaning of the appeal is the traditional 'do not patronize this establishment'" (*id.* at 954). And if *Honolulu Typographical* even suggests that the possible discomfort of passing a few pickets by justifies an absolute ban on that form of communication, that suggestion has ben superseded by subsequent decisions in this Court.

Such a generalized concern about the potential effects of "picketing * * * as a class" is similar to that expressed by Chicago in *Mosley, supra*, about the supposed tendency of "non-labor picketing * * * to produce violence" (See 408 U.S. at 100.) The Court there replied:

> Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines School District*, 393 U.S., at 508. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. [408 U.S. at 100-101.]

We would add that a rule which would ban picketing on the ground that it imposes a choice on members of the public would undermine constitutional protection for all uses of the streets as public forums. For a person who meets some-

one passing out leaflets, or seeking signatures on a petition, or making a speech, must either turn away from the latter, thereby signifying disapproval or unconcern, or else accept the invitation. This Court's opinion's have never suggested that speech may be suppressed to avoid such casual, momentary encounters.

As Mr. Justice Powell emphasized in *Erznoznik, supra:*

> When the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Kovacs* v. *Cooper, supra,* at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman* v. *City of Shaker Heights, supra.* As Mr. Justice Harlan cautioned:
>
> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U.S., at 21. [422 U.S. at 209-210.] [29]

[29] *Albany Welfare Rights Organization* v. *Wyman,* 493 F.2d 1319, 1324 (C.A. 2), *cert. denied* 419 U.S. 838 cited at Safeco Br. 25, properly distinguished picketing from the distribution of handbills because of the *place,* namely a waiting room inside a building. The Court of Appeals there did

> not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights. We do not suggest that an AWRO representative would have the right to demand the name of a person on the waiting line if he chooses not to give it. But we cannot assume, on the other hand, that everyone on the waiting line would reject all communication with such representative. This is not an intrusion into the home, the church, or the voting booth. It involves simply talking to people who are waiting. Unless there is a showing that the listener has been badgered to the point of being made a captive, this intrusion on privacy in a public waiting room is slight against the heavy presumption in favor of free speech and assembly, which are preludes to the orderly redress of grievances. [493 F.2d at 1324]

Finally, it cannot be successfully maintained that picketing is uniquely subject to prohibition on the theory that this form of communication is more likely than other means to persuade customers not to purchase the struck product, and thereby to put pressure on the retailer not to sell it. For that is *not* a constitutionally sufficient basis for regulating "a form of communication protected by the First Amendment". (*Organization For a Better Austin* v. *Keefe,* 402 U.S. 415, 419.)

Mr. Chief Justice Burger wrote in *Keefe*:

> In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to "force" respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State,* [308 U.S. 147]; *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those

practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability. [402 U.S. at 419.] [80]

In sum, the First Amendment does not allow Government to protect "neutral" sellers or struck employers from the consequences of the public's informed exercise of its lawful option to purchase or not to purchase a struck product. "It is precisely this kind of choice between suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us." (*Va. Pharmacy Bd., supra,* 425 U.S. at 770.)

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[80] While *Keefe* involved leafletting, the principle there stated applies equally to picketing, which is also a protected "form of communication".

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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No. 79-672

In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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I.

The Union devotes the bulk of its brief (pages 32-86) to the contention that Section 8(b)(4)(ii)(B) of the Act would be unconstitutional if it were construed to prohibit consumer picketing at the premises of a neutral retailer which, though confined to the struck product, would have the predictable effect, if successful, of causing the retailer's customers to cease dealing with it altogether. Although we anticipated this contention in our opening brief (pages 22-25), the Union's extensive argument warrants a further reply.

a. It is settled law that "while picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464 (1950). It "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion). Picketing "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Building Service Employees* v. *Gazzam*, 339 U.S. 532, 537 (1950).

Accordingly, it has long been established that "a State, in enforcing some public policy * * * could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters* v. *Vogt*, 354 U.S. 284, 293 (1957).[1] And, in *Electrical*

[1] See *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing to compel a violation of the state antitrust law); *Building Service Employees Union* v. *Gazzam*, *supra* (picketing to compel the employer to force his employees to accept the union as their representative); *Teamsters* v. *Hanke*, 339 U.S. 470 (1950) (picketing to compel self-employed persons to join the union); *Hughes* v. *Superior Court*, *supra* (picketing to compel retail stores to hire a certain proportion of black employees); *Plumbers Union* v. *Graham*, 345 U.S. 192 (1953) (picketing to compel an "all union" job); *Teamsters* v. *Vogt*, *supra* (picketing to compel the employer to force his employees to join the union); *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215 (1974) (picketing to disrupt the business of employers with whom the union has no primary dispute).

Workers, Local 501 v. *NLRB*, 341 U.S. 694 (1951), it was held that Congress had the same power. There it was contended that the ban against inducement or encouragement of work stoppages by secondary employees, contained in the old Section 8(b)(4)(A) (and continued in the current Section 8(b)(4)(i)(B)), could not constitutionally be interpreted as reaching such inducement or encouragement as flowed from the mere imposition of a picket line at the premises where the employees were at work. The Court rejected this contention, stating (341 U.S. at 705):

> The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgment of free speech * * *. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparable unlawful objectives [citing *Gazzam*, *Hanke*, *Hughes*, *Giboney*, *supra*]. There is no reason why Congress may not do likewise.

b. The Union seeks to distinguish *Electrical Workers* and most of the state cases (note 1, *supra*) on the ground that the picketing there was addressed to employees who were union members, whereas here it was merely addressed to members of the public. It is argued that Congress could constitutionally regulate the former because it is a "signal" to action, i.e., such picketing makes an appeal to individuals who are subject to group discipline based on common in-

terests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions; so that when they see the picket line, they can be expected to respond to it. Picketing which appeals to the public, on the other hand, has no such "signal" effect and is closer to the core notion of constitutionally protected free speech; to ban it, so the argument goes, runs afoul of the First Amendment, at least absent a specific showing that the picketing is directed to inciting or producing imminent lawless action or is likely to incite or produce such action. (Union Br. 40-79.)

This distinction, however, was presented and rejected in *Hughes* v. *Superior Court, supra.* In that case, a group of pickets peacefully patrolled the premises of a store owned by Lucky Stores, Inc., to compel the employer (Lucky) to hire black clerks in proportion to the number of black customers. The picket signs read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." The picketing was peaceful and orderly; the pickets did not prevent customers or employees of Lucky from going to and from the store; and the picketing was unaccompanied by threats, misrepresentation, or intimidation. Nor was there a finding that the picketing in any way affected Lucky's business. The California Supreme Court nevertheless upheld an injunction against the picketing, on the ground that it was contrary to state policy to compel an employer to discriminate in hiring (32 Cal. 2d 850, 198 P. 2d 885 (1948)). It did so over the dissent of Justice Traynor,

who contended that, since the picketing did not possess "signal" aspects, it could not constitutionally be enjoined (32 Cal. 2d at 871, 198 P. 2d at 897). This Court affirmed the California court, holding that the picketing was validly enjoined, for "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations"—that is, to compel employment on racial grounds (339 U.S. at 464).

The Court—speaking about the kind of consumer picketing there involved and not merely about picketing which is a signal to employees—explained (339 U.S. at 464-465):

> But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" [quoting from *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (1942) (concurring opinion)]. Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Accordingly, the Court concluded, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if * * * the purpose which it seeks to effectuate gives ground for its disallowance" (339 U.S. at 465-466).

In short, *Hughes* demonstrates that picketing in furtherance of an objective that government has a legitimate interest in regulating may be constitutionally interdicted even though it is not a "signal" to *employee* action, but seeks to attain its objective through an appeal to consumers not to patronize.[2] As the Court recently reaffirmed, "for First Amendment purposes, picketing is qualitatively 'different from other modes of communication.'" *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 311 n.17 (1979), quoting *Hughes* v. *Superior Court*, *supra*, 339 U.S. at 465.[3]

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[2] The Union attempts (Br. 65) to analogize the consumer picketing in *Hughes* to signal picketing because "about 50% of the [store's] customers * * * were Negroes * * * [and] the * * * store was systematically patrolled by pickets carrying placards stating that Lucky refused to hire Negro clerks in proportion to Negro customers" (339 U.S. at 461). But this ignores the very distinction the Union seeks to make between consumer picketing, which appeals to the "reason, loyalty, and other emotions" of the public to whom it is addressed, and picketing aimed at employee-union members, which is "backed by the threat of economic punishment." Union Br. 68; see Cox, *Strikes, Picketing and the Constitution*, 4 Vand. L. Rev. 574, 593-595 (1951). *Hughes* recognizes that both forms of picketing have effects greater than mere speech.

[3] As one informed commentator has stated:

> "What difference is there between the sympathetic cooperation of the public, on the one hand, and of workers, on the other? * * * All picketing is obviously conducted to coerce. The desired coercion is achieved through convincing customers not to enter, by persuading loyal employees to withdraw, by influencing job hunters to remain away, and by enlisting the aid of all other union folk with a prejudice against crossing picket lines. I do not suggest that peaceful picketing coerces those whose aid is requested. But I doubt if much support is won on intellectual conviction as to the merits of the cause. Most of it is probably induced by a combination of fear, prudence and social embarrassment—a sort of psychological coercion which compounds itself ultimately into economic coercion on the picketed business." Gregory, *Constitution Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191, 207 (1950).

Nor may the Union (Br. 59-61) distinguish *Hughes* on the ground that the object of the picketing there was to compel the employer to commit an unlawful act, whereas here it would not be unlawful for consumers to boycott a retail store selling a struck product. In *Hughes*, too, the object of the picketing was not itself unlawful. As the Court stated in *Hughes* (339 U.S. at 468): "If because of the compulsive features inherent in picketing, beyond the aspect of mere communication as an appeal to reason, a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, *it need not forbid the employer to adopt such a quota system of his own free will*" (emphasis added).[4]

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[4] Mr. Justice Reed concurred on the ground that he read the opinion of the Supreme Court of California to hold that the pickets sought from Lucky a discrimination unlawful under California law and that picketing in furtherance of

To be sure, in *Hughes* the objective of the picketing, though not unlawful, was contrary to the public policy of the state, while here it is not contrary to the policy of the Labor Act for consumers to boycott a neutral employer for reasons of their own or even to be persuaded to do so as a result of publicity other than picketing.[5] However, in regulating secondary boycotts, neither the legislature nor the courts need declare the boycott itself unlawful or contrary to public policy; they may confine themselves to proscribing the attainment of the boycott objective by coercive means, such as picketing directed at neutrals. Thus, in *American Radio Ass'n* v. *Mobile Steamship Ass'n, supra,* the Court held that the state could constitutionally ban picketing of foreign flag ships which implored the public to "Ship American", because such picketing threatened to disrupt the businesses of American stevedoring companies and ship-

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an illegal object may be barred by a state under *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Justices Black and Minton similarly concurred on the ground that the case was controlled by the principles announced in *Giboney*. The Union suggests (Br. 61 n.17) that, if *Hughes* meant what the majority opinion said, "it was an unacknowledged expansion of *Giboney*." Yet the concurring opinions refute any implication that the Court's statement quoted above was inadvertent or the case's relation to *Giboney* was unperceived.

[5] A proviso to Section 8(b)(4) exempts from its prohibitions "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization," that products produced by an employer with whom the union has a primary labor dispute are distributed by another employer, so long as the publicity does not have the effect of cutting off the secondary employer's deliveries or inducing his employees to cease work.

pers that had dealings with those ships and the state had a legitimate interest "in preserving its economy against the stagnation that could be produced by pickets' disruption of the businesses of employers with whom they have no primary dispute" (419 U.S. at 231). See also *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722 (1942). Similarly here, in furtherance of its legitimate goal of avoiding disruptions to commerce by "shielding unoffending employers and others from pressures in controversies not their own" (*NLRB* v. *Denver Building Trades Council*, 341 U.S. 675, 692 (1951)), Congress could ban the use of consumer picketing at secondary sites which has the intended or predictable effect of persuading the customers of the secondary employer to cease all trading with him, while permitting "publicity, other than picketing" which might achieve the same result without the special coercive features inherent in such picketing. "[P]icketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution." *Babbitt* v. *United Farm Workers, supra,* 442 U.S. at 311 n. 17.[6]

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[6] The above analysis is not inconsistent with such cases as *Teamsters Union* v. *Newell*, 356 U.S. 341 (1958) and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), cited by the Union (Br. 43-44). Those cases involve legislative or injunctive bans drawn in "sweeping and inexact terms" (*Carlson* v. *California*, 310 U.S. 106, 112 (1940)), which imposed a blanket prohibition against all peaceful picketing, including primary picketing.

c. The Union's reliance on *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (Br. 34-35), is misplaced. There, a city ordinance banned all picketing near a school, but exempted peaceful picketing of any school involved in a labor dispute. No valid legislative purpose justified this exemption, for the major justification offered—that nonlabor picketing is more apt to produce violence than labor picketing—was without any basis in fact. 408 U.S. at 100-102. Accordingly, the Court concluded that the ordinance discriminated on the basis of the message conveyed by the picketers and thus violated the Equal Protection Clause and the First Amendment.[7]

Here, on the other hand, as shown (page 3), Congress has a valid legislative purpose in banning secondary consumer picketing in a labor dispute where it has the predictable effect of causing a total boycott of the secondary employer's business. Hence, the fact that secondary consumer picketing is permitted in other contexts does not establish that Congress is discriminating against labor picketing, but only that other forms of secondary consumer picketing have not presented an evil which Congress has deemed it necessary to regulate. That the Labor Act's restriction on secondary consumer picketing does not discriminate against the message that

[7] The question whether *Mosley* requires invalidation of a state statute banning picketing at dwellings used solely for private residential purposes, but permitting picketing of homes used for other purposes, is presented in *Carey* v. *Brown*, No. 79-703.

unions may convey at secondary sites, but merely controls the special kind of pressure that picketing tends to impose on neutral employers, is confirmed by the fact that Congress did not preclude unions from conveying their message through publicity other than picketing (see note 5, *supra*).

In sum, the Act's regulation of consumer picketing is not directed at the communicative aspect of that activity, but rather at the coercive impact of that activity on neutral employers in labor disputes. Accordingly, the validity of such regulation is to be judged not by the rigorous First Amendment standards, but rather by a balancing of the respective interests involved—i.e., does the regulation further an important and substantial governmental interest and is the incidental restriction on the flow of information or ideas no greater than is essential to the furtherance of that interest? See *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968); *Cox* v. *Louisiana*, 379 U.S. 559, 563-564 (1965). See, generally, L. Tribe, *American Constitutional Law* 580-582, 598-601 (Foundation Press 1978). We have shown that the Act's regulation of consumer picketing satisfies this test.

II.

a. The Union argues (Br. 15-20) that *Tree Fruits*, 377 U.S. 58 (1964), establishes an absolute principle that product picketing is lawful no matter what its foreseeable impact on the neutral employer. It is claimed that the Court found that Congress' basic purpose was to avoid creating "a separate dispute with

the secondary employer," and accordingly, "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." *Tree Fruits, supra,* 377 U.S. at 72. However, these statements were made in the context of a situation where the targeted product was only a small portion of the total goods sold by the neutral retailer, and thus it was possible to keep the union's dispute with the primary employer from affecting the neutral's business generally. Where, as here, the struck product constitutes all or substantially all of the neutral's business, or where, as in the merged product situation (Bd. Main Br. 18-22), the struck component cannot be segregated, an appeal to consumers not to purchase the struck product would, if successful, necessarily cause "customers not to trade at all with the secondary employer," and thereby create "a separate dispute with the secondary employer." *Tree Fruits, supra,* 377 U.S. at 72.

b. The Union further argues (Br. 13-14) that the Board's interpretation of *Tree Fruits* "operates in a manner obverse to what one would expect, given the basic focus of the secondary boycott prohibitions"—i.e., to avoid "pressure brought to bear * * * not 'upon the employer who alone is a party [to a dispute] but upon some third party who has no concern in it.' " For, the Board's view "would forbid struck product picketing of retailers closely tied economically to the primary employer, while permitting such picketing where the retailer is merely a purchaser

of the primary employer's product as one among many." However, the Board's finding, upheld by the court of appeals, establishes that the land title companies, although dependent on Safeco's product, are nonetheless not allied with Safeco, but are neutral employers who are powerless to resolve the underlying primary dispute.[8] There is nothing anomalous about Congress's deciding to protect such neutral employers from the effect of consumer picketing where it would have the intended or predictable effect of curtailing their entire business, but not where it would have a lesser impact.

c. Finally, there is no merit to the Union's contention (Br. 21-24) that the Board has returned to the economic impact test adopted by the court of appeals and expressly rejected by this Court in *Tree Fruits.* As noted in our opening brief (page 15, n. 11), the economic test of the court of appeals in *Tree Fruits* would have required a determination in each case of whether the union's picketing was likely to have a "substantial economic impact" on the neutral's business. By contrast, the test here is the one suggested by this Court in *Tree Fruits*—whether the picketing called for a boycott of the neutral's entire business. The latter test is easier to apply and the facts relevant to its application can be more readily determined by the union. Determining whether the struck product constitutes all or virtually all of the neutral's business should present no greater difficulty

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[8] The Union does not challenge this finding here (Br. 14 n. 3; 4 n. 2).

for the Union than does determining, for example, whether an employer is truly a neutral or allied with the primary employer (see *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y. 1948)), or whether a contractor is performing routine maintenance or capital improvement work at the primary employer's premises. See *Local 761, Int'l Union of Electrical, Radio & Machine Workers* v. *NLRB (General Electric Co.)*, 366 U.S. 667, 680-682 (1961).

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 79-672

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, et al..

==========

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

==========

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

==========

The NAACP Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as amicus curiae.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional and other rights by prosecuting and defending law suits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court involving demonstrations and picketing. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

The Legal Defense Fund believes that its experience in litigation arising out of picketing and demonstrations may be of assistance to the Court in this case.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted and that the attached brief be filed.

Respectfully submitted,

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IN THE

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BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

==========

STATEMENT OF INTEREST

This case, though immediately concerned with the First Amendment rights of labor organizations, has far broader ramifications. The previous decisions of this Court have drawn no

sharp distinctions between labor picketing to induce consumer boycotts and similarly motivated picketing by other organization. See, e.g., Hughes v. Superior Court, 339 U.S. 460, 466 (1950). The principles developed in labor cases have been relied on in analyzing the First Amendment rights of picketing to protest government conduct. Cox v. Louisiana, 579 U.S. 559, 563-4 (1965).

Picketing, along with larger public demonstrations, has served historically as a vital vehicle for protesting racial discrimination and social injustice. Such public protests played an essential role in the civil rights movement of the last decade. Picketing in particular served to focus attention on employers, public accommodations or voting registrars that engaged in discriminatory practices. The cumulative effect of the particular instances of discrimination thus highlighted increased the nation's awareness of invidious racial practices, and spurred the public debate which led ultimately to the adoption of the civil rights acts of 1964, 1965 and 1968.

Such picketing and demonstrations were aimed at altering discriminatory practices that had substantial official and public support in certain areas of the country. State and local officials, correctly realizing that these protests threatened to frustrate their policies of segregation, frequently sought to prevent protests whose peacefulness and orderliness was beyond dispute, but whose goals they disliked. State court injunctions and prosecutions of protesters resulted, and this Court was required on repeated occasions to intervene on behalf of the First Amendment rights of those opposed to racial discrimination. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Fields v. South Carolina, 375 U.S. 44 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963).

Picketing and other forms of public protest remain as vital tools in rectifying racial and social injustices. Today those devices are utilized to call attention to a variety of grievances with public officials, particularly claims of unremedied police brutality and unfair allocations of government services. The ability to

conduct those activities at a site relevant to the origin of the grievance is critical; the public and press would often notice and heed a group of pickets at city hall, but would rarely consider the same group in a vacant lot a mile away. Merchants are at times the focus of consumer picketing related, inter alia, to the price or quality of goods sold. All of these practices are implicated by the constitutional questions presented by this case.

This case has particularly important ramifications for a civil action now pending in the courts of Mississippi, Claiborne Hardware v. N.A.A.C.P. That action arose out of a 1966-69 boycott of white merchants by local civil rights activists who, believing that the merchants exercised de facto control over city officials, picketed the merchants in the hope that they would, in turn, cause those officials to end a variety of discriminatory practices. In 1976 a state court judge, sitting without a jury, branded these efforts an unlawful secondary boycott, and awarded $1,250,699 in damages against the defen-

dants, including the national N.A.A.C.P.[1/] If this award were sustained it would, without question, destroy the N.A.A.C.P. as an organization. In upholding the constitutionality of this award the Mississippi trial judge relied upon the same cases relied upon here by the N.L.R.B. Opinion dated August 9, 1976, pp. 55, 60. As a result of a boycott connected with a civil rights march in 1966 led by James Meredith, Mississippi awarded substantial damages against the Southern Christian Leadership Conference, injuring that organization's activities on behalf of minority rights. Southern Christian Leadership Conference v. A. G. Corporation, 241 So. 2d 619 (1970).

The pending litigation against the N.A.A.C.P. involves a statute which, as here, forbids the advocacy of consumer conduct which is itself legal. Section 97-23-85, M.C.A. 1972. That statute is broader than section 8(b)(4)(ii) of the National Labor Relations Act, in that it forbids not only picketing but any advocacy

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1/ The NAACP Legal Defense and Educational Fund, Inc., is not part of the N.A.A.C.P.

of a "secondary" boycott. While there are obvious differences between Clairborne Hardware and the instant case, any decision on the constitutional issues presented by this case would be of vital importance to the N.A.A.C.P. and all other civil rights organizations.

SUMMARY OF ARGUMENT

Section 8(b)(4)(ii) prohibits pickets from advocating, or communicating information to induce, certain types of consumer boycotts of merchants. Under the National Labor Relations Act, however, it would be perfectly legal for consumers to engage in such boycotts, or for merchants to give in to them. Regardless of the precise types of boycotts which cannot be induced by picketing, section 8(b)(4)(ii) is unconstitutional on its face because it forbids advocacy of lawful conduct.

Notwithstanding earlier decisions to the contrary, Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), and its progeny have treated picketing in a manner drastically dif-

ferent than other types of speech or speech-conduct combinations. Ritter allows the government to regulate the content of the ideas expressed by pickets on a mere showing that such regulation furthers some official policy. This lax standard, which has never commanded the support of more than a bare majority of this Court, has been undermined by a number of recent decisions, and should be overruled.

Ritter and its progeny assume that, because the communicative aspect of picketing occurs in conjunction with conduct, e.g., patrolling, that the picketing can be regulated. But other decisions of this Court make clear that where speech and conduct are so combined, the government's regulatory authority extends only to the conduct aspect of the act, not to its communicative facets. Buckley v. Valeo, 424 U.S. 1, 17-19 (1976); United States v. O'Brien, 391 U.S. 367, 375-77, 381-82 (1968). Thus the conduct aspect of picketing confers on the government only authority to regulate the number or noisiness of pickets, not the substance of what they wish to say.

The purpose of section 8(b)(4)(ii) is to stop or reduce perfectly lawful consumer conduct by obstructing presentation of information about a labor dispute which might lead consumers to decide not to patronize a product or merchant. Ritter sanctions such government imposed silence as a method of achieving a state goal. But later decisions of this Court make clear that this is not a means available to the government under the First Amendment. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97 (1977); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 769-70 (1976). If the government wishes to stop consumer boycotts, or merchant conduct based on such boycotts, it must do so by directly forbidding such boycotts or conduct, not by silencing advocacy of boycotts and conduct which are left lawful.

Once the government decides to leave the conduct of consumers to their own judgments, subject to debate about labor matters in the free marketplace of ideas, it cannot limit one party's access to that market. Both labor and business must be free to advocate in any peaceful manner

that consumers patronize or boycott a firm. Section 8(b)(4)(ii) interferes in that competition in a discriminatory manner. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). Restrictions on advocacy of consumer boycotts are particularly suspect, since such boycotts of British goods were by far the most important non-violent method by which the colonists sought, often successfully, the repeal of British statutes to which they objected, including the Stamp Act, the Townshend Acts, and the Intolerable Acts. All of these boycotts were secondary, since the colonists' grievance was with the British government, not with the British merchants themselves.

Congress' decision to prohibit picketing while permitting unions to advocate by other means consumer boycotts may have been based on the view that picketing was an excessively effective form of communication. The First Amendment, however, forbids interfering with the speech of one party in order to enchance the relative voice of another. Buckley v. Valeo, 424 U.S. 1, 48-50 (1976).

ARGUMENT

SECTION 8(b)(4)(ii) OF THE NATIONAL LABOR RELATIONS ACT, INSOFAR AS IT FORBIDS PEACEFUL PICKETING ADVOCATING LAWFUL CONDUCT, IS UNCONSTITUTIONAL

The parties are in disagreement as to two questions arising under section 8(b)(4)(ii) of the National Labor Relations Act: first, whether N.L.R.B. v. Fruit and Vegetable Packers, 377 U.S. 58 (1964), correctly construed the statute to allow secondary picketing aimed solely at the struck product and, second, if so, whether that exception to the general prohibition against picketing to produce a "secondary boycott" applies to the facts of this case.

There is no dispute, however, as to the basic thrust of section 8(b)(4)(ii). A labor organization is forbidden to engage in peaceful picketing disclosing truthfully that a firm is selling the products of an employer involved in a labor dispute if, because of that picketing, consumers

decide not to patronize the firm so long as it deals in those products. It is also clear that the National Labor Relations Act in no way prohibits a consumer from actually withholding his or her patronage from a firm dealing in such disputed products; indeed, a union may urge consumers to do so so long as that advocacy is not by means of picketing. Section 8(ii); see Tree Fruits, 377 U.S. at 79 (Black J., concurring). Equally undisputed is that a firm may, on its own initiative or because of consumer or employee pressure, refuse to deal in products from a plant involved in a labor dispute. N.L.R.B. v. Servette, Inc., 377 U.S. 46, 50-51 (1964).

Section 8(b)(4)(ii) thus forbids union advocacy, by means of peaceful and truthful picketing, of actions by consumers, and action by the vendor, which are themselves "perfectly legal". Tree Fruits, supra. We believe that the First Amendment prohibits the government from forbidding the advocacy of lawful actions even where, as with picketing, that advocacy is conjoined with conduct. Accordingly, we urge that section 8(b) (4)(ii) is unconstitutional regard-

less of the correctness and meaning of the construction offered in Tree Fruits.

It may be possible to construe section 8(b)(4)(ii) so that its prohibitions do not apply to the facts of this case, thus avoiding a decision on the constitutional issues. But to do so would be to leave in effect a statutory prohibition, often enforced as here by an injunction that is a classic prior restraint, which both forbids and deters the communication of information and ideas. In the area of First Amendment freedoms this Court customarily relaxes its self-imposed rules of standing because of the "danger of tolerating ... the existence of a ... statute susceptible of ... improper application." Bigelow v. Virginia, 421 U.S. 809, 816 (1975). "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). In this case there is more than merely a danger that section 8(b)(4)(ii) will

be enforced as we have described; the N.L.R.B. actively pursues just such an enforcement policy, and unions throughout the country are inhibited from engaging in picketing which, in our view, is protected by the First Amendment. To continue, as in Tree Fruits, to avoid this constitutional problem by construing the statute to allow the particular picketing before the Court is to permit continued violations of the constitution in a far larger category of cases.

For reasons such as these this Court in Village of Schaumburg v. Citizens for a Better Environment, 48 U.S.L.W. 4162, 4165 (1980), proceeded to pass on the constitutionality of a prohibition against asserted First Amendment rights without deciding first if the prohibition would actually apply to the party seeking to challenge it. See also Babbitt v. Farm Workers, 60 L.Ed. 2d 895, 908-910 (1979). We believe the Court should do so here as well.

I. INTRODUCTION: THE SPECIAL TREATMENT OF PICKETING IN CARPENTERS AND JOINERS UNION V. RITTER'S CAFE, 315, U.S. 722 (1942), AND ITS PROGENY

The first constitutional decisions of this Court dealing with picketing treated it in the same manner as other forms of communication. In Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937), Justice Brandeis stated that union members might through picketing "make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." 301 U.S. at 478. Thornhill v. Alabama, 310 U.S. 88 (1940), struck down a blanket prohibition against picketing to persuade persons not to do business with a firm. It characterized picketing as a "practicable, effective means whereby those interested -- including the employees directly affected -- may enlighten the public on the nature and causes of a labor dispute." 310 U.S. at 104. A companion case, Carlson v. State of California, 310 U.S. 106 (1940), struck down a similar statute, explaining that "[t]he carrying of signs and banners ... is a

natural and appropriate means of conveying information on matters of public concern." 310 U.S. at 112-13. American Federation of Labor v. Swing, 312 U.S. 321 (1940), considered an injunction against picketing by any person who did not work for the employer being picketed; this Court found that prohibition "inconsistent with the guaranty of freedom of speech." It held that, even absent any actual dispute between the employer and the picketing employees, "[c]ommunication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can [not] be barred because of concern for the economic interests against whom they are seeking to enlist public opinion...." 312 U.S. at 326. See also Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 297 (1940).

Subsequent decisions established that pickets, like others engaged in the communication of ideas, could not ordinarily advocate illegal conduct. Even "pure speech" is generally not protected when its purpose is to produce unlawful activity. Dennis v. United States, 341 U.S. 494 (1951); Pittsburgh Press Co. v. Pittsburgh Commis-

sion on Human Relations, 413 U.S. 376 (1973). Probably a majority of the decisions in this Court upholding restrictions on pickets involved such advocacy of illegal conduct. In I.B.E.W. v. N.L.R.B., 341 U.S. 694, 705-6 (1951), the pickets sought to induce an illegal strike; thus the illegal conduct there advocated would have been on the part of those respecting the picket line. In Giboney v. Empire Storage and Ice, 336 U.S. 490, 492-3 (1949), the pickets sought to force the picketed firm to refuse to sell ice to non-union peddlers, which refusal would have violated state criminal law; there the advocated illegality would have been on the part of the picketed employer.2/

Section 8(b)(4)(i) of the National Labor Relations Act forbids employees of one employer from engaging in a strike or other job action to compel their employer to refuse to deal with another employer; it would be unlawful, where

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2/ See also Building Service Employees v. Gazzam, 339 U.S. 531, 553 (1950) (pickets sought to induce employer to compel his employees to join the union, which compulsion would have violated state law); Local Union No. 10 v. Graham, 345 U.S. 192 (1953) (pickets sought to induce employer to hire non-union labor, in violation of state right-to-work law.)

a vendor was selling products from a struck plant, for its employees to go on strike for that reason, or for the employees of yet a third party to refuse to make deliveries to the vendor. Thus picketing, or any other form of communication, aimed at inducing such a strike or other job action, could be prohibited, since the conduct advocated would be illegal. Hence in the instant case it would be constitutional to enjoin picketing which successfully urged the employees of the Safeco Group Companies to go on strike. See Local 761 v. N.L.R.B., 366 U.S. 667 (1961).

In sum, neither early cases such as Thornhill, nor the Giboney line of decisions, treat picketing differently than other methods of communication. Thornhill recognized that the conduct associated with picketing could be restricted if it in fact presented a "danger of destruction of life or property", 310 U.S. at 105, but this power did not extend to a regulation of the content of the ideas advocated by the pickets.

This Court departed sharply, and in our view incorrectly, from these decisions in its opinion in Carpenters and Joiners Union v. Ritter's Cafe,

315 U.S. 722 (1942). In Ritter the restaurant owner had hired a non-union firm to do construction at another site; a construction union picketed the restaurant, precipitating both a consumer boycott and a strike by the restaurant employees. Although, so far as appears from the opinion, neither the conduct of the consumers nor that of the striking restaurant employees was illegal under state law, the Texas court enjoined the picketing. This Court narrowly upheld that injunction on the ground that stopping the picketing furthered a state policy, whose wisdom the Court thought irrelevant, to protect "neutrals" from involvement in labor disputes. 315 U.S. at 728. Four members of the Court dissented from this departure from Thornhill. 315 U.S. at 729 (Black, J., dissenting), 732 (Reed, J., dissenting).

Eight years later Hughes v. Superior Court, 339 U.S. 460 (1950), extended Ritter to what was unquestionably a dispute with the employer being picketed; it upheld an injunction against picketing to induce a store owner to hire blacks in proportion to the number of blacks among its

customers. Such a hiring practice was declared by the state courts to be against state "policy." 339 U.S. at 446. This Court thought it irrelevant whether the quota hiring being sought would have been legal, 339 U.S. at 466, although there is some possibility it would have been held unlawful by the state courts. See 339 U.S. at 463-4. International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950), also involved a "primary" boycott. Union members picketed a firm which refused to work union hours; although the firm was a partnership with no employees, its longer hours obviously affected the willingness of other employers to stay open only during those hours. Again the Court narrowly upheld the injunction, the plurality opinion arguing that the injunction furthered a state "policy in favor of self-employment." 339 U.S. at 480.

The line of decisions commenced by Ritter ultimately led to International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957). The facts in Vogt involved an attempt by pickets to induce an employer to force his workers to join a union, which compulsion apparently would have violated state law. 354 U.S. at 286. Rather than

relying on Giboney, the Vogt majority proceeded to analyze the case as if the pickets had advocated lawful conduct. It criticized Thornhill as unduly broad, 354 U.S. at 288-9, and characterized Ritter and similar cases as "reassessments" of Thornhill. 354 U.S. at 291. Vogt declared these cases "establish a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 293. That rule was applied, again by a bare majority of the Court, in American Radio Association v. Mobile Steamship Association, 419 U.S. 215, 229-32 (1974), to upheld an injunction against pickets objecting to the shipping of goods on non-union foreign-registry vessels. That picketing precipitated a strike against all ships in the port, union and non-union alike, and thus arguably constituted an unfair labor practice in violation of section 8(b)(4)(i); but the case arose in state court where the advocated conduct, though "against state policy", was apparently legal.

Ritter and its progeny thus held that peaceful and truthful picketing, advocating lawful conduct, may be forbidden by the government if that advocacy may result in conduct which, though legal, is "against government policy." This rule is an aberration in First Amendment law; no other form of speech, or speech-plus-conduct, may be forbidden on such a ground. In several of the cases in which the doctrine has been applied the picketing could have been prevented on another basis.

Most importantly, several recent lines of decisions in this Court have undermined the reasoning on which Ritter and the cases which follow it are based. As we set out in detail below, these recent decisions cannot be reconciled with the standard set by Ritter and applied as recently as American Radio Association. We urge, accordingly, that Ritter be overruled.

II. THE CONJUNCTION IN A SINGLE ACT OF CONDUCT AND SPEECH CONFERS UPON THE GOVERNMENT ONLY THE AUTHORITY TO REGULATE THE CONDUCT ASPECT OF THAT ACT, NOT THE CONTENT OF THE SPEECH

Although Ritter itself does not explain why picketing is any different than pure speech,

Hughes,[3] Hanke,[4] Vogt[5] and American Radio Association[6] all emphasize that picketing involves not just the communication of ideas, but entails "conduct" as well. The only aspect of the conduct specifically referred to is "patrolling", walking back and forth in front of the site being picketed. As this Court explained in another context, "picketing involves elements of both speech and conduct, i.e., patrolling, and ... because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." Food Employees v. Logan Valley Plaza, 391 U.S. 308, 313 (1968).

The conclusion which the Ritter progeny draw from the presence of this conduct element is that the speech-conduct admixture of picketing becomes, in the words of Hanke, "a hybrid". 339 U.S. at

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3/ 339 U.S. at 464-5.

4/ 339 U.S. at 474.

5/ 354 U.S. at 289, 290.

6/ 419 U.S. at 229.

474. The protections accorded speech are not merely reduced by the incidental impact of regulation of the associated conduct, such as limits on the number of pickets. Rather, these cases hold that the speech aspects of picketing as such enjoy less protection because they are somehow tainted by association with the conduct. While speech by itself can be restricted only to protect "a subordinating interest which is compelling", First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978), the ideas communicated by picketing are said to be subject to restriction to advance any valid state policy.

Picketing, however, is not the only form of communication that combines speech with conduct. Marching, demonstrations, meetings, and door-to-door canvassing involve conduct. Indeed, virtually all of the effective methods for the widespread dissemination of ideas involve some form of conduct. The decisions of this Court regarding

such other speech-conduct combinations establish constitutional standards clearly inconsistent with those in Ritter and its progeny.

The earliest cases dealing with this problem conerned the licensing of parades and demonstrations. From Hague v. C.I.O., 307 U.S. 496 (1939), to Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), this Court has drawn a consistent distinction as to the basis on which parade permits could be given or withheld. A constitutionally valid statute must limit that permit decision to considering whether the time, place and manner of the march would disturb the public. See Hague v. C.I.O., 307 U.S. at 516; Shuttlesworth v. Birmingham, 394 U.S. at 154-156; Cox v. New Hampshire, 312 U.S. 569, 576 (1941). The regulatory power stems from the government's "duty and responsibility to keep [its] streets open and available for movement", Shuttlesworth v. Birmingham, 312 U.S. at 152, and extends only so far as that duty and responsibility require. Hague warned that this discretion could not be so exercised with regard to the content of the views being expressed in the parade as to become an instrument for "suppression of free expression of views", 307 U.S. at 516, and

Cox cautioned that the licensing must be made "without unfair discrimination." Cox, 312 U.S. at 578, and Shuttlesworth, 394 U.S. at 152, both appear to assume that for constitutional purposes parades and picketing are indistinguishable.

The strong indication in the parade cases that the government can regulate only the conduct aspect of a conduct-speech combination is confirmed by decisions in other areas. Justice Black, concurring in Tree Fruits, argued that the statute at issue in the instant case was unconstitutional because it undertook to regulate, not the conduct of the pickets, but the content of the ideas being advanced by them.

> The statute in no way manifests any government interest against patrolling as such, since the only patrolling it seeks to make unlawful is that which is carried on to advise the public, including consumers, that certain products have been produced by an employer with whom they have a dispute. All who do not patrol to publicize this kind of dispute are, so far as this section of the statute is concerned, left wholly free to patrol. Thus the section is aimed at outlawing free discussion of one side of a certain kind in a labor dispute and cannot be sustained as a permissible regulation of patrolling. 377 U.S. at 78-79.

Such regulation of speech was subject to the usual stringent constitutional standard, and

therefore invalid. 377 U.S. at 79. Justice Douglas advanced the same distinction in Food Employees v. Logan Valley Plaza, 391 U.S. at 326. "Picketing is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated."

The full Court adopted this distinction two months after Food Employees in United States v. O'Brien, 391 U.S. 367 (1968), "[W]hen 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations on First Amendment freedoms." 391 U.S. at 376. (Emphasis added). While the amount of government interest involved was not the stringent "compelling interest" standard, the Court emphasized that the interest must be "unrelated to the suppression of free expression". 391 U.S. at 377. O'Brien explained the earlier decision in Stromberg v. California, 283 U.S. 359 (1931), striking down a statute forbidding the use of a flag to express opposition to the government, in light of this distinction. "Since the statute

there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." 391 U.S. at 382. Justice Black's concurring opinion in Tree Fruits was cited with apparent approval. Id.. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court held that, even though independent political expenditures might involve an element of conduct, regulation of such expenditures was nonetheless subject to the usual stringent First Amendment standards because the government's "interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful'." 424 U.S. at 17. See also First National Bank of Boston v. Bellotti, 435 U.S. 765, 786, n.23 (1978).

These cases make clear that when speech and conduct are combined in a parade, the display of a flag, the expenditure of funds to influence an election, or the destruction of a draft card, that combination gives to the government no power to control the substance of the speech involved; only regulation of the conduct is exempt from the usual stringent First Amendment standard.

Picketing is no different. Cox and Shuttlesworth treat parades and picketing as indistinguishable. The majority opinion in O'Brien relies on Justice Black's opinion in a picketing case. Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), expressly held that a limitation on the "subject matter" of picketing cannot be regarded, or upheld, as a "time, place and manner" regulation. 408 U.S. at 97-99.

The conduct element in picketing, which often involves only one or two individuals,[7/] is modest by comparison to the thousands of demonstrators in Shuttlesworth or to other parades and public meetings. The most noted form of conduct involved in picketing is patrolling, walking back and forth in front of a particular site. In fact such movement is not necessarily regarded by the pickets as essential to their activity; often the pickets prefer to stand still, and only move because directed to do so by a police officer. That

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7/ See, e.g., International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 472 (1950) (one picket); Local 10 v. Graham, 345 U.S. 192, 199 (1953) (one or two pickets); N.L.R.B. v. Fruit and Vegetable Packers, 377 U.S. 58, 60 (1964) (two or three pickets); Police Department of Chicago v. Mosley, 408 U.S. 92, 93 (1972) (one picket).

one or two people walk back and forth on a path a few yards long seems hardly more "conduct" than if they stood still. A lecturer pacing back and forth the same distance would not ordinarily be described, on that account, as engaging in "speech plus"; indeed, certain classical Greek philosophers are known as the Peripatetics because it was the practice of Aristotle to walk through the Lyceum as he discoursed with his pupils. If the union members in this case had "patrolled" in front of the Safeco affiliates carrying handbills, an injunction based on the content of those leaflets would be treated as a prior restraint on free speech. The applicable legal standard is no different because here they carried signs instead.

III THE FIRST AMENDMENT PRECLUDES INTERFERENCE WITH ADVOCACY OF, OR COMMUNICATION OF FACTS INTENDED TO INDUCE, LAWFUL CONDUCT

The restriction contained in section 8(b)(4)(ii) is unquestionably aimed at the substance of the views being advanced by union pickets. For the reasons set forth in part II, the constitutional standards applicable to such a restriction are the same as those which would apply if the law forbad handbills, parades, speeches or books advocating the same sort of boycott, or describing

the same underlying labor dispute.[8/]

The legislative history of section 8(b)(4)(ii) leaves no doubt that Congress intended that section, at the least, to sharply reduce the number and effectiveness of consumer boycotts. Whether the public interest in even eliminating these boycotts would constitute "a subordinating interest which is compelling", First National Bank of Boston v. Bellotti, 435 U.S. at 786, may well be doubted; had Congress thought the matter of such great importance it would have flatly prohibited consumer boycotts, as it had earlier forbidden secondary employee action, rather than merely partially obstructing advocacy of such conduct. The Court need not, however, resolve that question, for several decisions of this Court make it clear that, regardless of the importance of the goal involved, Congress chose an impermissible means by which to achieve it.

(1) The conduct sought by union pickets subject to section 8(b)(4)(ii) is itself entirely

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8/ The House version of section 8(b)(4)(ii) contained just such a sweeping prohibition against communication. See Tree Fruits, 377 U.S. at 66-69.

lawful. A consumer may completely refuse to patronize a Safeco affiliate because of the labor dispute at Safeco, and an affiliate, because of such a boycott, or otherwise, could legally transfer its business from Safeco to another firm. The National Labor Relations Act neither forbids these actions nor places any obstacle whatever in the way of a consumer or vendor that decides to take them. What the Act seeks, rather, is to prevent a union from providing a consumer with the information or arguments which might lead to such a boycott. Congress, apparently believing that many consumers would engage in a boycott if they knew that a union wanted them to do so, or perhaps merely upon learning that a vendor was selling products from a struck plant, forbad unions from providing that information to consumers in the manner which Congress, employers, and unions alike recognize as the most direct, effective and inexpensive method of communication -- picketing.

This Court has repeatedly held that the government cannot, consistent with the First Amendment, seek to prevent otherwise lawful conduct by suppressing the information on which

that conduct depends. In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), Virginia sought to prevent consumers from choosing among pharmacists on the basis of their charges by forbidding the advertising of those fees. This Court held that, while the state could limit competition in other ways,

> it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. 425 U.S. at 770.

In Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), town officials sought to reduce panic selling of homes by forbidding the posting of "for sale" signs in front of houses, thus preventing homeowners from knowing how many houses in their neighborhood were on the market. In invalidating that ordinance this Court reasoned that, however laudable the township's goal might be, "the First Amendment disabled [it] from achieving its goal by restricting the free flow of information." 431 U.S. at 95. Here, as in Linmark and Virginia Pharmacy, the suppression of

information is not complete; while the most effective and traditional manner of communication has been forbidden, other more cumbersome methods remain. But Linmark and Virginia Pharmacy condemned regulating conduct by suppressing information, however partial or imperfect that suppression might be.

(2) Here, unlike Linmark and Virginia Pharmacy Board, the suppression is intended to tip in favor of one side a public debate regarding alternative courses of action.

In those cases the suppressed information was of importance to the potential seller and buyer respectively, but bore little if at all on any contest of ideas between adverse parties. Here, however, the primary effect of whether a consumer boycotts a vendor is not on the consumer, who can presumably buy similar goods or services elsewhere, but on the union which favors, and the vendor and struck employer which oppose, that boycott. In the contest for the support of consumers, the employer will defend its conduct in the labor dispute, and the vendor will urge that it not be penalized for merely selling a product from the disputed employer. The union in turn

will argue the merits of its position in the primary dispute, and the importance of consumer support to bring about the successful conclusion of the strike or other job action. But in a society where some consumers will ordinarily support a boycott urged by a union, and where few consumers will know about labor disputes at often distant plants, or about the presence of merchandise from such plants on a merchant's shelves, merely informing the consumer that the union advocates a boycott and why is likely to be of critical importance. "When we prohibit consumer picketing we compel the public, through ignorance of the situation, to side with the employer rather than the union. We prevent the consumer from making his own choice." 105 Cong. Rec. 16397 (daily ed., Sept. 3, 1959), (remarks of Sen. Morse).

The prohibition of speech involved here is thus far from neutral. The employer and vendor are entirely free to engage in any solicitation they please to entice consumers to shop at the vendor's store or buy the struck product, while section 8(b)(4)(ii) forbids the union to use its most effective means of communication, picketing, to reveal to consumers that the union wants them

to exercise their legal right to boycott the vendor. Indeed, it is only a labor organization that is forbidden to picket for such a secondary boycott; if, for example, the vendor refused to handle the struck product, the employer could send agents to picket the vendor, urging consumers to boycott the vendor because of that action. Even if the statute forbad the use of pickets by all parties, that would not render it equitable. A labor law cannot be described as fair because it forbids union members and high corporate officials alike to walk picket lines, leaving both free to publicize their views through full page advertisements in the New York Times or commercials on network television. Such lavishly expensive methods may be within the reach of large corporations, but "[p]icketing is ... the working man's method of giving publicity to the facts of industrial life." Local Union No. 10 v. Graham, 345 U.S. 192, 202 (1953) (Douglas, J., concurring).

Congress, by refusing to prohibit consumer participation in secondary boycotts, has chosen to leave the consumer's decision whether to boycott a vendor dealing in stuck products to the free marketplace of ideas; having so chosen, Congress

cannot constitutionally restrict the access of one contestant to that market. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), this Court struck down an ordinance which permitted labor unions, but not others, to picket near open school buildings.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. ... There is an "equality of status in the field of ideas," and government must afford all points of view on equal opportunity to be heard. 408 U.S. at 96.

These considerations apply a fortiori where the restriction forbids, not all discussion of a particular topic, but only advocacy by one side of a particular point of view. See also Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring).

(3) Suppression of speech is permitted, if at all, only in the presence of a compelling public interest, First National Bank of Boston v. Bellotti, 435 U.S. at 786, because there, faced with a conflict between speech and a public policy of extraordinary importance, the government may be permitted to prefer the latter. But that

justification requires a demonstration that the speech and policy are in conflict, a demonstration which cannot be made where the government has not sought to utilize methods short of censorship to achieve its goals. Thus in Virginia Pharmacy Board, 425 U.S. at 770, and in Linmark, 431 U.S. at 97, this Court emphasized that the government had not sought to achieve its goals by regulating conduct rather than by suppressing information. As a general matter, whatever the public policies involved, an enactment suppressing advocacy of lawful conduct must fall because a less constitutionally offensive means, regulating the conduct itself, has not been utilized.

(4) There are, of course, situations in which the constitution itself protects particular conduct; in such a case the government cannot circumvent that protection by forbidding advocacy of the constitutionally protected behavior. See Bigelow v. Virginia, 421 U.S. 809, 822-826 (1975). Such considerations may well be present here. In the decade leading to the Revolution the primary method utilized by the colonists to advance their interests was what we would now describe as a secondary boycott. Aggrieved

successively by the Stamp Act, the Townshend Acts, and the Intolerable Acts, the colonists joined in increasingly effective agreements to refuse to purchase British goods until the measures were repealed. In 1774, for example, the Continental Congress adopted a resolution agreeing to refuse, until the Intolerable Acts wre rescinded, to "import into British America, from Great Britain or Ireland, any goods, wares, or merchandize whatever".[9/] The British government, which had enacted the disputed measures, was not the vendor of these goods, and did not suffer directly from the boycott. But the colonists reasoned that the British merchants who would be damaged would in turn use their considerable influence to obtain repeal of the objectionable legislation. That is precisely what in fact occurred.[10/]

The patriots who led the nation through these painful, but at times successful, boycotts, were in

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9/ H.S. Commager, Documents of American History, p. 85 (7th Ed., 1963).

10/ S.E. Morrison, Oxford History of American People, pp. 197-200, 208 (1963). Petitions from London merchants urging repeal of these measures are set out in H.S. Commager, Documents of American History, pp. 59-60, 87-88 (7th Ed., 1963).

many cases the same men who framed and brought about the adoption of the Constitution and the Bill of Rights. It seems unlikely that they would have authorized the Congress to strip Americans of what had been one of the most important political tools of the era leading to the Revolution. A consumer's privilege to withhold his or her patronage for political or social reasons, such as supporting trade unions, may well be numbered among the rights reserved to the people by the Ninth and Tenth Amendments. At the very least, advocacy of such boycotts, in which virtually every colonial leader engaged at some point between 1765 and 1775, must be viewed as enjoying a particularly high level of constitutional protection.

(5) If, as we urge, the government cannot forbid advocacy of lawful conduct, the distinction between such speech and advocacy of unlawful conduct will not always be clear. Although, for example, union pickets may urge a secondary consumer boycott of a vendor, they may not urge an unlawful job action against that vendor by his or other employees. Where the pickets' signs, whatever their content, provokes such a job

action, the Board could constitutionally require the union to take whatever steps were necessary to halt that impact, including removing the pickets if necessary. In this case, however, the picketing in fact produced neither a work stoppage at, nor interference with deliveries to, the Safeco affiliates. App. 10-20. In other situations a single communication may unavoidably bring about both legal and illegal conduct; thus while the sale of cigarettes to minors is generally unlawful, there is no effective manner by which cigarette advertising could be framed to encourage smoking by adults alone. Under such circumstances a dual impact communication could be prohibited.

IV. THE FIRST AMENDMENT PRECLUDES INTERFERENCE WITH A PARTICULAR METHOD OF ADVOCACY OR COMMUNICATION BECAUSE THAT METHOD IS THOUGHT TO BE EXCESSIVELY EFFECTIVE

Congress acted to forbid certain picketing because it believed picketing was the most important and effective method by which a union urged people to boycott a vendor. The legislative history set out in detail by Safeco suggests Congress may have felt that picketing was in a sense too effective, that it would too easily

succeed in persuading consumers not to patronize a vendor or, perhaps, not to buy a product. Actual experience, of course, is often to the contrary; recent union-supported boycotts of nonunion lettuce and of clothes produced by the J.P. Stevens Company have met with uneven results. Union members at times cross picket lines, not only to shop, but also to work. However, even if a picket line had the galvanizing effect that Congress may have believed, that would not be a legitimate basis for restricting its use.

The possibility that some form of advocacy could be forbidden because it was thought "unduly" effective at promoting the advocated, and entirely lawful, action, has been consistently rejected by this Court. In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), a prohibition against corporate expenditures to influence referenda was defended on the ground that, because of their great wealth, corporate advocates could overwhelm opposing points of view. This Court found that argument constitutionally untenable:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that the advocacy may persuade the electorate is

> hardly a reason to suppress it: the Constitution "protects expression which is eloquent no less than that which is unconvincing." 435 U.S. at 790.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court disapproved on similar grounds a ceiling on direct expenditures in support of candidates:

> It is argued ... that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation. ... But the concept that government may restrict the speech of some elements of our society in order to enchance the relative voice of others is wholly foreign to the First Amendment.... 424 U.S. at 48-49.

Mills v. Alabama, 384 U.S. 214 (1966), rejected the suggestion that election day newspaper editorials could be prohibited because they might have a disproportionate effect on the electorate.

These decisions apply a fortiori to peaceful picketing. Picketing is particularly effective for three reasons. First, its message is delivered at the time and place where a consumer decides whether to patronize the vendor or buy the struck product. But this does not involve any

exaggerated impact of the message on the people to whom it is relevant, only the efficiency of avoiding giving that message to the vast majority of the population who would never deal with the vendor anyway. Targeting communication at the audience which will act on it is the normal practice in all areas of speech.

Second, the message is presented on a sign, whose content can be gleaned by consumers from a distance, affording them time to reflect on its contents before they reach the door of the vendor. The sign may be read by consumers who would be reluctant to accept a handbill, or who would take a leaflet but only read it, if at all, after they had left the vendor's premises. A two foot square sign, which often consists of a 50 cent piece of cardboard on which the picket has hand written his or her message, is among the most modest conceivable methods of written communication. The use of such signs is a universally available method of written speech, accessible to the vast majority of the population unable to afford the multimillion dollar advertising campaigns approved in First National Bank and Buckley, or to buy and editorialize through

the newspaper involved in Mills, and even to those so impecunious that they cannot afford to print handbills or leaflets. If there is a serious imbalance of communicative ability between such a sign in the hands of a lone picket, and a corporate employer or vendor which can spend millions of dollars on sophisticated radio, television and newspaper advertisements promoting its goods or services, that imbalance surely is not one which favors the sign.

For some, particularly union members or supporters, a picket line may be vested with special importance. For them, though clearly not for others, "[t]he loyalties and responses evoked and exacted by picket lines are unlike those following from appeals by printed word". Hughes v. Superior Court, 339 U.S. 460, 464-5 (1950). But if certain individuals have a particular sense of loyalty evoked by a picket line, that is not because human beings are born with an instinctive respect for picket lines. On the contrary, a picket line in 1800 would have provoked no particular response other than public curiosity, and today an anti-union picket line objecting that an employer hired union members

would not provoke the reaction referred to in Hughes. The public response to a picket line is obviously dependent on the identity of the pickets and the content of their message.

Any special respect accorded union picket lines is the result of a century of argument and debate, repeated within each generation, as to whether working men and women ought to support one another during periods of labor negotiations and strikes. Advocates of the union movement have urged their members and others that improvements in the terms and conditions of employment require such outside assistance, and that individuals not directly involved in the dispute could or should rely on the union concerned to select appropriate goals or tactics. The correctness or wisdom of such associational or ideological loyalties are not matters into which the government can inquire. Loyalty to a union, or the union movement, and deference to its views, are not different in principle from similar loyalties and deference to one's employer, the chamber of commerce, a political party, or a religious organization. Much of the free speech which occurs in our society is directed at producing just such allegiances.

To implement this loyalty unions have for years sought with some success to establish the picket line as the generally accepted method by which a labor organization indicates to its supporters that it wishes them to take some action with regard to the site involved. In an earlier era unions used different methods, such as handbills,[11/] or urging supporters to patronize only stores displaying a union card in their windows. International Brotherhood of Teamsters v Hanke, 339 U.S. 470 (1950). Today the International Ladies Garment Workers Union broadcasts commercials urging consumers to "look for the union label", in the hope they will buy only clothes which have such a label. These devices are similar to the forms of communicative shorthand used by other organizations and institutions.

When union labels, union cards, or union picket lines are extremely effective methods of communication, that is not because labels, cards, or picket lines have some mysterious and talismanic significance, but because management

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11/ See M. B. Schnapper, American Labor: A Pictorial Social History, 245-47 (1972).

has for the time being lost the debate for the loyalties of the American public concerning labor disputes in general, or as to the particular labor dispute involved. To the extent that management has lost the debate regarding whether consumers should heed the call to action signaled by labels, cards or pickets, the government can no more seek to compensate for the unpersuasiveness of management arguments by forbidding use of such signals than it could seek to compensate for the momentary unpopularity of the Democratic party by forbidding Republicans from disclosing the party to which they belonged.

CONCLUSION

For the above reasons Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942), should be overruled. Section 8(b)(4)(ii) of the National Labor Relations Act, insofar as it forbids peaceful picketing advocating lawful conduct, should be declared unconstitutional. Accordingly, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF SAFECO TITLE INSURANCE COMPANY

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (Pet. App. A, pp. 1a-44a) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. C, pp. 47a-66a) are reported at 226 N.L.R.B. 754.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, pp. 45a-46a) was entered on June 29, 1979. On September 14, 1979, the Chief Justice extended the time in which to file a Petition for Writ of Certiorari to and including October 27, 1979. The Petition for Writ of Certiorari was filed on October 24, 1979, and was granted on January 7, 1980 (A.47). The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

This case involves Section 8(b) of the National Labor Relations Act, as amended, 29 U.S.C. 158(b), which provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents. . .
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is. . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .
>
> *Provided, further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . .

QUESTION PRESENTED

Whether consumer picketing by a labor union at the premises of a neutral employer, directed at the product of a firm with which the union has a dispute, is forbidden by Section 8(b)(4)(ii)(B) of the National Labor Relations Act when the predictable result of the picketing, if successful, will be to persuade the neutral's customers to cease dealing with it altogether.

STATEMENT

This case was presented to the National Labor Relations Board (the "Board") by means of a written stipulation and exhibits (A.12-43; R. Vol. I Part 7). The facts thus are undisputed.

The Primary Employer.

Safeco Title Insurance Company ("Safeco Title"), a California corporation, is engaged in the title insurance business in the State of Washington (A.7, 11, 14).

The Neutral Employers.

Safeco Title has contractual arrangements (reflected in an "Agency Contract") with five separate and independent Washington corporations, referred to collectively herein as the

"Land Title Companies."[1] Each "Agency Contract" provides that the Land Title Company can solicit, execute and deliver, in the name of Safeco Title, "title commitments" (including policies of title insurance) in its particular county in the State of Washington (A.15-20, 25-34; R. Vol. I, Part 7, Ex. 3, 4, 5, 6, 7). The agency contract provides that Safeco Title shall underwrite certain defined losses (A.31; R. Vol. I, Part 7, P.8 of Ex. 3, 4, 5 and 7.). The Land Title Companies pay to Safeco Title 12½ percent of the premium received for each title insurance policy issued under Safeco Title's name (A.30; R. Vol. I, Part 7, P.7 of Ex. 3, 4, 5 and 7). The Land Title Companies derive from 90 to 95% of their income from the issuance of such policies (A.15-20).

The steps taken by the Land Title Companies with respect to the issuance of title insurance are as follows:

(1) A request for issuance of a title report is received;

(2) A search of the title is conducted (under the agency contract, and under Washington state law (Rev. Code Wash. 48.29.040), each "agent" must maintain complete tract indices relating to real estate transactions in its particular county);

(3) A title report is issued along with a commitment to insure, setting forth the following information with respect to the property: taxes, easements, judgments, liens and any title defect; and

(4) On conveyance of the property, the title insurance policy is issued (A.15-20).[2]

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[1] The companies involved are: Land Title Company of Pierce, County, located in Tacoma, Washington; Land Title Company of Snohomish County, located in Everett, Washington; Land Title Company of Kitsap County, located in Bremerton, Washington; Land Title Company of Cowlitz County, located in Longview, Washington; and Land Title Company of Clark County, located in Vancouver, Washington (A. 6-7).

[2] For a further explanation of the title insurance business, see Johnstone, *Title Insurance*, 66 Yale L.J. 492 (1957); Quiner, *Title Insurance and the Title Insurance Industry*, 22 Drake Ins. L. Annual 711 (1973); S. Huebner, K. Black & R. Cline, Property and Liability Insurance 330-341 (1968).

The Labor Dispute.

On July 17, 1974, Respondent Retail Store Employees Union Local 1001 (the "Union") was certified by the Board as the collective bargaining representative of certain employees of Safeco Title at its Seattle office (A.14; R. Vol. I, Part 7, Ex. 2). Following a period of collective bargaining, the Union commenced a strike against Safeco Title on November 18, 1974 (A.14).

Picketing by the Union at the Land Title Companies.

On different dates during the strike against Safeco Title, the Union picketed the premises of the Land Title Companies, with picket signs reading:

"SAFECO NON-UNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001"

(A.16-20)

The Union also passed out handbills urging recipients to "Boycott Safeco Insurance" naming several "Safeco Group Companies" other than Safeco Title (A.21, 43).

The picketing and handbilling did not result in any work stoppage, or any interference with deliveries to the Land Title Companies (A.16-20).

Unfair Labor Practice Proceedings.

After unfair labor practice charges were filed by one of the Land Title Companies and by Safeco Title, the General Counsel of the Board issued a complaint alleging that the picketing of the Land Title Companies by the Union violated Section 8(b)(4)(B) of the Act (A.2-10). The Union filed an answer denying the commission of an unfair labor practice (A.11-12). All parties waived a hearing before an Administrative Law Judge and entered into a stipulation of facts for submission directly to the Board (A.11-22). The Board accepted this stipulation (A.45-46), and held that the picketing

in question violated Section 8(b)(4)(ii)(B) of the Act and ordered the Union to desist therefrom (Pet. App. C, pp. 59a-62a).

In reaching this conclusion, the Board considered the Union's argument that the decision in *Tree Fruits*[3] permitted the Union's picketing (Pet. App. C, p. 58a). The Board, however, had earlier held in *Dow Chemical*[4] that the *Tree Fruits* doctrine was "not applicable where the picketing is reasonably calculated to induce customers not to patronize the neutral parties at all" (Pet. App. C, p. 58a). In the present case, the Board found:

> The facts of the present case indicate that a successful boycott of Safeco insurance policies would predictably involve a virtually complete boycott of the Land Title Companies. Between 90 and 95% of the Title Companies' gross revenue is derived from the issuance of Safeco policies. The remainder is derived from sources which are largely ancillary to the issuance of title insurance policies, *e.g.*, title research and escrow services. Respondent's activities therefore had the predictable result of dragging the Land Title Companies into its dispute with the primary employer, Safeco. The Land Title Companies, powerless to resolve the dispute, would be forced to cease doing business with Safeco or go out of business if the consumer appeal were successful. We find, therefore, that Respondent's consumer appeal constitutes coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Pet. App. C, p. 59a.

[3] *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits Labor Relations Committee, Inc.)*, 377 U.S. 58 (1964) (hereinafter cited as "*Tree Fruits*").

[4] *Local 14055, United Steelworkers (Dow Chemical Company)*, 211 N.L.R.B. 649 (1974), *enforcement denied sub nom. Local 14055, United Steelworkers v. NLRB*, 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded sub nom. Dow Chemical Co. v. Local 14055, United Steelworkers*, 429 U.S. 807 (1976), *complaint dismissed on remand sub nom. Local 14055, United Steelworkers*, 229 N.L.R.B. 302 (1977) (hereinafter cited as "*Dow Chemical*").

The Union petitioned the Court of Appeals for the District of Columbia Circuit to review and set aside the Board's order, and the Board cross-applied for enforcement. The court of appeals, *en banc*, reversed the Board, holding that *Tree Fruits* dictated that, so long as the Union's picketing was structured to affect only the "struck product" (title insurance), the picketing was proper (Pet. App. A, pp. 21a-35a).[5]

SUMMARY OF ARGUMENT

Tree Fruits is not applicable to the present case. *Tree Fruits* involved carefully limited picketing in a context which bears no resemblance to the present case. None of the careful steps taken by the union in *Tree Fruits* were taken in the present case. In addition to the fact that the Union's picket signs did not carry a "consumer boycott" message, the neutral Land Title Companies did not simply act as retailers of a "product" purchased from Safeco Title. Moreover, due to the fact that the Land Title Companies derive nearly all their income from the issuance of title insurance policies under Safeco Title's name, the picketing in the present case would, if successful, result in a virtually complete boycott of them—a result *Tree Fruits* holds to be prohibited.

The *Tree Fruits* distinction is simply not workable in the present case for distinguishing protected from unprotected activity. As in other cases where "consumer product" picketing

[5] Due to the relationships between Safeco Title and the Land Title Companies, the Union argued before the Board and before the court of appeals that the Land Title Companies were "allies" of Safeco Title, as that term is used in the cases under the National Labor Relations Act (Pet. App. C, pp. 53a-54a; Pet. App. A, pp. 5a-6a). The Board rejected the Union's argument, and the court of appeals upheld the Board's decision (Pet. App. C, pp. 54a-58a; Pet. App. A, pp. 6a-11a). Since the Union has not petitioned for review of this aspect of the court of appeals' decision, the "ally" question is not presently before the Court.

would result in a broader boycott of the neutral employer, the *Tree Fruits* distinction breaks down. Accordingly, *Tree Fruits* should be confined to its facts and not extended to the present case. This limitation of *Tree Fruits* would not create an anomaly since it would recognize that consumer picketing directed to a substantial portion of the neutral's business would force the neutral to become involved in the labor dispute, whereas the picketing in *Tree Fruits* did not have this likelihood.

If *Tree Fruits* cannot be confined to its facts, it should be reconsidered since it will result in legalizing activity clearly intended by Congress to be prohibited. The legislative history of the 1959 Landrum-Griffin Amendments to the Act demonstrates that Congress intended to prohibit all secondary picketing. Attempting to distinguish between *Tree Fruits* picketing, and other forms of secondary consumer picketing is futile. All secondary consumer picketing should be recognized as prohibited since it inevitably calls for a general boycott of the neutral. The picket line, in and of itself, is a call for a general boycott, notwithstanding the precise language on the placards. This "signal aspect" of picketing has been recognized by the Court, and is utterly inconsistent with a stated claim by a union that its appeal is limited to the "struck product."

There is no merit to the Union's argument that the prohibition of secondary consumer picketing is an unconstitutional infringement of its First Amendment rights. Because picketing is largely conduct, and because its "signal aspect" contradicts any stated purpose to the contrary, Congress may constitutionally regulate it. When balanced against the right of the neutral employer to be free from the coercive effects of such picketing, the Union's right to so publicize its dispute with the primary employer must give way, particularly in view of the fact that other, more effective and less coercive, avenues remain open to it.

ARGUMENT

I. *Tree Fruits* Is Not Applicable To The Present Case.

In *Tree Fruits,* the Court held that, despite the literal language of Section 8(b)(4)(ii)(B) (and contrary to the views of most commentators[6]) Congress had not intended to prohibit narrowly circumscribed picketing of a retail store urging consumers not to purchase a particular product produced by employers with whom the union had a dispute. The Court distinguished the carefully limited picketing conducted there from a generalized appeal not to do business with the neutral employer.

The error of the court below was to indiscriminately apply *Tree Fruits* to the very different facts of the present case, resulting in "absurd and unintended results." *See Michigan v. Mosley,* 423 U.S. 96, 102 (1975). As the Court stated in *Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1944), "general expressions transposed to other facts are often misleading." In order to determine whether *Tree Fruits* is applicable to the present case, the facts presented to the Court there must first be analyzed.

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[6] *See* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 1086, 1114 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 Minn. L. Rev. 257, 274 (1959); Fairweather, *An Evaluation of the Changes in Taft-Hartley,* 64 Nw. U.L. Rev. 711, 733 (1960); Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions,* 48 Geo. L.J. 327, 341 (1959); Ryan, *Recognition, Organizational and Consumer Picketing,* 48 Geo. L.J. 359, 369-70 (1959); *cf.* Fleming, *Title VII: The Taft-Hartley Amendments,* 54 Nw. U.L. Rev. 666, 688-93 (1960). *But see* Previant, *The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis,* 48 Geo. L.J. 346, 353 (1959).

The commentators did not change their view following *Tree Fruits. See* Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits,* 49 Minn. L. Rev. 479, 481 (1965); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682, 687 (1965); Note, *Consumer Picketing Under the Landrum-Griffin Amendments to the Taft-Hartley Act,* 12 U.C.L.A. L. Rev. 238, 244 (1964).

In *Tree Fruits* a union was on strike against certain employers which sold Washington State apples to the Safeway chain of retail stores in Seattle, Washington. The union decided to encourage consumers not to purchase these apples. Consequently, the union delivered to each store manager a letter specifically stating that the union would place pickets at the store "for the purpose of trying to persuade the public not to buy Washington Apples." The union informed the store managers that the pickets were instructed to patrol only in front of consumer entrances, not at delivery entrances, and were instructed not to interfere with the work of the store employees or with deliveries to the store. The store managers were also given a copy of the detailed written instructions provided by the union to the pickets, containing these and other restrictions. 377 U.S. 58, at 59-60, 74.

The union then commenced its consumer picketing with placards stating "To the Consumer: Non-Union Washington State apples are being sold at this store. Please do not purchase such apples. Thank you. Teamsters Local 760, Yakima, Washington." In addition, the union pickets passed out handbills which read in part "This is not a strike against any store or market." *Id.* at 61 n.3.

On the basis of these facts, the Court held that the legislative history of Section 8(b)(4)(ii)(B) "[did] not reflect with the requisite clarity a congressional plan to *proscribe all* peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing *when it is limited, as here,* to persuading Safeway customers not to buy Washington State apples when they are traded in the Safeway stores." *Id.* at 63 (emphasis added). The Court contrasted the facts of that case with the use of picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." *Id.* The Court went on to note that in the case of peaceful picketing directed only at the struck product;

> the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

Id. at 63-64 (footnote omitted). Finally, the Court concluded that the "consumer picketing carried on *in this case* is not attended by the abuses at which the statute was directed." *Id.* at 64 (emphasis added).

Because the facts of the present case are "poles apart" (*see Id.* at 70) from those in *Tree Fruits,* a different result is called for here. The following crucial differences from *Tree Fruits* should be noted:

1. The signs utilized by the Union's pickets were in no sense "consumer boycott" signs. Rather, they were traditional "primary" picket signs, akin to "Do Not Patronize" signs.[7]

2. The handbills passed out by the Union in the present case did not even mention the putative "struck product"—title insurance issued under Safeco Title's name. Rather, the handbills referred only to other "Safeco Group Companies" which, so far as the record is concerned, are unrelated to Safeco Title and the Land Title Companies.

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[7] Safeco Title argued to the Board that the language of the signs themselves made the picketing improper (Pet. App. C, p. 53a). The Board, however, found it unnecessary to pass on this argument (Pet. App. C, 59a n.16). The court of appeals left the question to be resolved by the Board on remand (Pet. App. A, pp. 5a-6a n. 13).

3. The Land Title Companies did not simply purchase a "struck product" from Safeco Title and then offer to resell it to the public, as was the case in *Tree Fruits*. Rather, Safeco Title was merely an underwriter and insurer of risks determined by the Land Title Companies. All of the work involved in issuing the title insurance policies (maintaining all of the real estate records for the particular county, accepting orders for title commitments, researching the real estate records, making decisions as to title commitments, preparing the title reports, etc.) was performed by the Land Title Companies—not Safeco Title.[8]

4. The Union's picketing, if successful, would result in virtually a complete boycott of the Land Title Companies.

Because of these crucial factual differences, *Tree Fruits* does not apply.

The distinction established in *Tree Fruits* between primary and secondary activity (*i.e.*, between following the struck product and persuading customers not to trade at all with the

[8] In view of these facts, Safeco Title argued before the Board (Pet. App. C, p. 53a) that this case was controlled by the "merged product" doctrine, exemplified by the following cases: *K & K Construction Co. v. NLRB*, 592 F.2d 1228 (3d Cir. 1979); *Hoffman v. Cement Masons Local 337*, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *NLRB v. Twin City Carpenters District Council*, 422 F.2d 309 (8th Cir. 1970); *American Bread Co. v. NLRB*, *411 F.2d 147 (6th Cir. 1969)*; and *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968). The court of appeals, believing that the Board had not based its decision on the merged product cases, refused to rule on this argument, leaving that question (as it did the question of the language of the picket signs themselves) to the Board for consideration on remand (Pet. App. A, pp. 27a-28a n.84). Since Safeco Title did not petition for review of this question, the issue is not presently before the Court. However, as the Board points out in its brief to the Court here, these cases support its decision. *See also* Note, 54 J. Urb. L. 579, 587-88 (1977); Comment, 30 Rutgers L. Rev. 176, 190 (1976).

secondary employer[9]) is applicable only in a relatively narrow factual setting. Where, as in *Tree Fruits*, the union confines its appeal to a particular struck product which represents a discrete but insignificant portion of the neutral retailer's product line, the union's activity can be readily distinguished as primary under the *Tree Fruits* test.

In the present case, however, the distinction disappears and one of the two competing interests plainly must yield. In similar cases where such a conflict has occurred, the paramount right of the neutral employer has been upheld. *See, e.g., American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (the primary's product has been integrated into the neutral's product); and *Honolulu Typographical Local 37 v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968) (the primary's product or service is used for the general benefit of the neutral's business).

> [W]here picketing means a total boycott, one interest must plainly yield, either the Union's desire to maximize pressure on the primary employer . . . by cutting off its markets or the neutral's desire to avoid a boycott of his entire business. In the 1959 amendments, Congress chose protection of the neutral from this sort of disruption as the interest more deserving of protection.

Honolulu Typographical Local 37 v. NLRB, 401 F.2d 952, 956 (D.C. Cir. 1968).

[9] The Court stated in *Tree Fruits* that:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firm are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer. 377 U.S. at 72. (Footnote omitted).

In these situations, because so much of the neutral employer's business is targeted by the picketing, the union, while technically confining its appeal to the primary product, is for all practical purposes seeking a generalized loss of patronage, a result which *Tree Fruits* dictates is unacceptable:

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.

377 U.S. at 70.

> Asking the public to totally boycott a neutral, is tantamount to a demand that he cease dealing with the primary object of the Union's grievance. It is just such activity which the Act prohibits.

Hoffman v. Cement Masons Local 337, 468 F.2d 1187, 1191 (9th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973) (citation omitted).

In the present case, as both the Board and the dissenters to the *en banc* opinion observed, the foreseeable consequences of the Union's picketing converted an appeal purportedly directed solely at the struck product into a prohibited call for a full boycott of the Land Title Companies (Pet. App. A, p. 40a; Pet. App. C, p. 59a). Such a result is precisely one of the "isolated evils" which Congress intended to eliminate by the language of Section 8(b)(4)(ii)(B).

The coercion from which the 1959 amendments were designed[10] to protect secondary employers is clearly present in the instant case given the fact that successful consumer picketing would cut off 90-95% of the Land Title Companies' business. Thus, to apply *Tree Fruits* to the utterly different facts

[10] The relevant legislative history is reproduced in the Appendix hereto, pp. 1a-23a.

of this case would so far stretch the Court's reasoning as to destroy the protection provided by Section 8(b)(4)(ii)(B) to the neutral Land Title Companies.

The Union will likely argue that not extending *Tree Fruits* to the present case would "stand the statute on its head" by permitting secondary consumer picketing only when it is ineffective (*i.e.,* when the product represents only an insubstantial portion of the neutral's business), but prohibiting it when it is effective (*i.e.,* when the product represents a substantial portion). This argument ignores the fact that the secondary boycott protections were adopted to prevent a union from coercing a neutral employer to become involved in labor disputes of others. 377 U.S. at 63.

In *Tree Fruits,* it was extremely unlikely that the picketing of Washington State apples would cause Safeway to become involved in the dispute between the Teamsters and the fruit packers. However, in the present case, since the boycott involves virtually all of the business of the Land Title Companies, it is far more likely that they would be forced by the picketing to become involved in the labor dispute by putting pressure on Safeco Title to settle the dispute.[11] It was this broadening of the sphere of the dispute that Congress sought to avoid. In short, limiting *Tree Fruits* to the facts of that case does no violence to the statutory scheme.

II. The *Tree Fruits* Exception Should Be Reconsidered Since Experience Has Shown That It Is Impossible To Apply In Other Factual Settings And That It Has Resulted In Destroying The Protection Of Neutrals Envisaged By Congress.

If the *Tree Fruits* ruling is not confined to its facts, the balance struck by Congress in Section 8(b)(4)(ii)(B) would be gravely upset. When taken to its extreme as the court of appeals did in the present case, *Tree Fruits* results in legalizing

[11] *See* Comment, 30 Rutgers L. Rev. 176, 189 (1976).

union activity clearly prohibited by Congress in Section 8(b)(4)(ii)(B).[12] Because of this, we respectfully suggest that *Tree Fruits* be reconsidered.

A. *Congress Intended to Ban All Secondary Consumer Picketing.*

The relevant portions of the legislative history of the 1959 Landrum-Griffin amendments to the National Labor Relations Act are set forth in the Appendix hereto, pages 1a to 23a. We submit that if anything is clear from the legislative history, it is that Congress intended to prohibit all secondary picketing.[13] The distinction drawn in *Tree Fruits* between limited consumer product picketing and generalized consumer boycott picketing is inconsistent with the congressional intent.

B. Tree Fruits *Does Not Provide a Workable Standard for Distinguishing Between Primary and Secondary Activity.*

Experience has shown that it is extremely difficult to apply the *Tree Fruits* distinction in the real world of labor disputes. Outside of the paradigm case itself, *Tree Fruits* does not provide a satisfactory standard for conduct. For instance, where the secondary employer sells almost exclusively the product of the primary (as in *Dow Chemical*), or where the secondary resells the primary's product after it has been integrated into another product (as in *American Bread Co. v. NLRB,* 411 F.2d 147 (6th Cir. 1969)), or uses the primary's product or service for the general benefit of its business (as in *Honolulu Typographical Local 37 v. NLRB,* 401 F.2d 952 (D.C. Cir. 1968)), the *Tree Fruits* distinction breaks down.

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[12] *See* Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537, 556 (1970).

[13] See the commentaries cited *supra,* Note 6.

The difficulty in applying the distinction to situations similar to the present case has been recognized by others,[14] but not yet considered by the Court. This difficulty is apparent in the present case as it was in *Dow Chemical.* The struggle by the Board and the court of appeals in trying to make the dictates of *Tree Fruits* conform to the facts of the instant case eloquently demonstrates the futility of attempting to use this distinction. It is simply unrealistic to maintain that the picketing in the present case did not have the objective of inducing the Land Title Companies to cease doing business with Safeco Title. Even if the picketing did not "coerce" customers, its overall effect was to "coerce" the Land Title Companies in violation of Section 8(b)(4)(ii)(B). The failure of *Tree Fruits* to provide a workable standard of conduct suggests that the doctrine should be reconsidered.

C. *Secondary Consumer Picketing Inevitably Calls for a General Boycott of the Neutral.*

The distinction in *Tree Fruits,* between limited consumer product picketing and picketing which appeals for a general consumer boycott of the neutral employer, is an abstract distinction which does not recognize the realities of union picketing.[15]

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[14] *See, e.g.,* R. Dereshinsky, The NLRB and Secondary Boycotts 73, 89-95 (Labor Relations and Public Policy Series Report No. 4, 1972); Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537 (1970); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682 (1965). Even those commentators who believe *Tree Fruits* was correctly decided have noted the difficulties in applying the decision to other situations. *See, e.g.,* Engel, *Secondary Consumer Picketing—Following the Struck Product,* 52 Va. L. Rev. 189 (1966).

[15] *See* Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits,* 49 Minn. L. Rev. 479, 486 (1965); Note, 12 U.C.L.A. L. Rev. 238, 245 (1964).

To suggest that limited "struck product" picketing is not coercive because it is, at the same time, an invitation to the public to cross the picket line and purchase other products from the neutral is a contradiction in terms.[16] As has long been recognized, a union picket line, without regard to the language of the picket signs, is an overt call not to cross the picket line.[17] That call is far louder than the niceties of the particular words on a placard.

The reality is that a union picket line simply cannot be limited to a stated purpose of only encouraging consumers not to purchase a particular product. The picket line itself requests a refusal to do business with the neutral. Here, as in other situations, actions speak louder than words.

The courts have long recognized this "signal aspect" of picketing.[18] In *Hughes v. Superior Court,* 339 U.S. 460, 465 (1950), the Court noted:

> Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of

[16] *See* Lewis, *supra* note 15, 49 Minn. L. Rev. at 492.

[17] Comment, *Secondary Consumer Picketing: Some Grafts on Tree Fruits,* 44 Tulane L. Rev. 537, 538 n. (1970); Comment, *Product Picketing—A New Loophole in Section 8(b)(4) of the National Labor Relations Act?,* 63 Mich. L. Rev. 682, 691-92 (1965); Note, 12 U.C.L.A. L. Rev. 238, 245 (1964).

[18] The term "signal aspect" as used in this brief denotes a more general phenomenon than that, as described by Professor Cox in *Strikes, Picketing & the Constitution,* 4 Vand. L. Rev. 574, 595-96 n. 5 (1951), limited to an appeal for support directed to other union members. Instead, the term as used in this brief refers to the reaction by both other union members and the public when encountering a picket line, regardless of the language on the placards. The Court has recognized the effect of the "signal aspect" of picketing on consumers as well as employees. *Hughes v. Superior Court,* 339 U.S. 460, 465 (1950).

> communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

See also Local 10, Plumbers and Pipefitters v. Graham, 345 U.S. 192 (1953); *International Brotherhood of Teamsters Local 309 v. Hanke,* 339 U.S. 470 (1950).

Mr. Justice Douglas, in his concurring opinion in *Bakery Drivers Local 802 v. Wohl,* 315 U.S. 769 (1942), pointed out that a picket line "may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." 315 U.S. at 776. The Court has similarly held in *Building Service Employees Local 262 v. Gazzam:* " [Picketing] is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey . . . ." 339 U.S. 532, 537 (1950).

Because of what the Court has termed the "compulsive features inherent in picketing," *Hughes v. Superior Court,* 339 U.S. 460, 468 (1950), the effect on those confronting a picket line will be the same regardless of the message on the placards: they will hesitate to cross the picket line. Even if the "signal aspect" of a picket line does not affect the conduct of those confronting it, the actual message conveyed by the physical presence of the pickets will be far different than the written message on the placards. As the Court of Appeals for the Fifth Circuit pointed out:

> A picket line . . . has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of "unfairness" on those engaged in activity behind the picket line.

Superior Derrick Corp. v. NLRB, 273 F.2d 891, 896 (5th Cir. 1960). The Court of Appeals for the Third Circuit in *K&K Construction Co. v. NLRB,* 592 F.2d 1228, 1234 n.6 (3d Cir. 1979), similarly noted:

> Traditionally, the public associates picketing with a labor dispute . . . . Thus picketing, because it instantly signals a labor dispute, is likely to signal the public that the employer being picketed is unfair to labor.

This "signal aspect" results not only in an inherently *misleading* message being communicated to consumers to the detriment of the innocent neutral, but conveyance of an *inconsistent* message as well. Congress adamantly refused to allow consumer picketing because the traditional message associated with a union picket line is "Do not cross." Allowing the conveyance of this broad message by the physical presence of a picket line, while expecting the consumer to act only on the basis of the "truthful" legends on the placards, ignores reality. The Court of Appeals for the Tenth Circuit pointed out this inconsistency when it stated:

> Generally, the very existence of a picket line is an appeal to the public and to other employees not to enter the picketed premises, notwithstanding printed declarations that the primary dispute is with another party who is not present.

NLRB v. Building Service Employees Local 105, 367 F.2d 227, 229 (10th Cir. 1966) (citations omitted). *See also NLRB v. Local 307, Plumbers,* 469 F.2d 403 (7th Cir. 1972); *NLRB v. Dallas General Drivers Local 745,* 264 F.2d 642 (5th Cir. 1959).

As the Fifth Circuit pointed out in *Burr v. NLRB:*

> [The union's theory] seems to assume that while a consumer picketing urging a *complete* boycott would be prohibited, this consequence does not attach if the plea is confined merely to the products of the primary employer. This is fallacious on at least two grounds. Perhaps the foremost is the damaging effect of any picket line posted in front of any retail establishment in the contemporary world of the highly developed organized trade unionist movement. [Footnote omitted.] Even more directly, a plea not to buy a particular product is in effect a plea not to trade with the secondary employer at all.

321 F.2d 612, 619-20 (1963) (emphasis in original).

Mr. Justice Harlan in his dissent in *Tree Fruits* recognized this fact:

> Because of the very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer to shop where they need not brave a picket line. Moreover, the public can hardly be expected always to know or ascertain the precise scope of a particular picketing operation. Thus in cases like this, the effect on the secondary employer may not always be limited to a decrease in his sales of the struck product.

377 U.S. at 82-83.

The "signal aspect" of secondary consumer picketing is especially significant since an unlawful purpose under Section 8(b)(4)(B) is imputed from the objective indicia surrounding the picketing, not the subjective intent of the picketing parties. *See Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949). The inevitable result is that secondary consumer picketing, no matter what the written message is, violates Section 8(b)(4)(ii)(B) because of necessity it conveys a message asking for a total consumer boycott of the neutral employer.

In summary, (1) Congress intended to ban all secondary picketing; (2) experience establishes that the consumer product picketing doctrine is unworkable; and (3) union picketing necessarily calls for a general boycott. In view of these facts, it is appropriate for the Court to reconsider *Tree Fruits,* and hold that 8(b)(4)(ii)(B) prohibits all secondary consumer picketing.

III. Section 8(b)(4)(ii)(B), Prohibiting Secondary Consumer Picketing, Is A Constitutional Exercise Of Congressional Power.

The Union will doubtless argue that the Congressional ban of all secondary picketing, including consumer picketing, viol-

ates its First amendment rights.[19] The Court should consider, *see NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22 (1963); *International Association of Machinists v. Street,* 367 U.S. 740 (1961), and reject that argument.

The decision by Congress to prohibit all secondary picketing is not constitutionally infirm since the substantive evils of this picketing—enlargement of the labor dispute and disruption of an innocent neutral's business—outweigh whatever First Amendment protection secondary consumer picketing may have, particularly since other and more effective means of communication are preserved. The Court has held that when Congressional protection of a "weighty interest" has a limited effect on First Amendment freedoms, such regulation is permissible. *See Buckley v. Valeo,* 424 U.S. 1, 29 (1976). On numerous occasions, state and federal regulation of picketing has been upheld.[20]

The paramount importance of protecting the rights of the neutral was consistently emphasized throughout the legislative debate on the Act. The Court, in turn, has recognized the Congressional objective "of shielding unoffending employers

[19] The First Amendment to the Constitution reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[20] The Court has held the following rights to outweigh picketing's First Amendment value: a city's right to regulate traffic, *Cox v. Louisiana,* 379 U.S. 536 (1965); the private property right, *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); the right of free choice by an employer, *Carpenters & Joiners Local 231 v. Ritter's Cafe,* 315 U.S. 722 (1942); contract rights, *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490 (1949); the state's right to regulate illegal conduct, *Hughes v. Superior Court,* 339 U.S. 460 (1950). Indeed, when confronted with traditional property rights, union picketing has no First Amendment protection at all. *Hudgens v. NLRB,* 424 U.S. 507 (1976).

and others from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 692 (1951); *see also NLRB v. Local 825, International Union of Operating Engineers,* 400 U.S. 297, 302 (1971); *IBEW Local 501 v. NLRB,* 341 U.S. 694, 705 (1951). As a result, "prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) [now 8(b)(4)(B)] carries no unconstitutional abridgment of free speech." *IBEW Local 501 v. NLRB,* 341 U.S. 694, 705 (1951); *see also Carpenters & Joiners Local 231 v. Ritter's Cafe,* 315 U.S. 722, 726 (1942).

Congressional enactment of the "publicity proviso"[21] which granted protection to all forms of consumer communication except picketing, clearly eliminated any First Amendment grounds to attack the Act. *Tree Fruits* raised but did not resolve the question of whether Congress could, consistent with the First Amendment, differentiate between picketing and all other forms of communication under the "publicity proviso." Examination of the First Amendment decisions by this Court and the lower federal courts reveals that this differentiation is valid because of the unique characteristics of secondary picketing: (1) it is largely comprised of coercive conduct; and (2) the little communicative value attributable to such picketing is completely undermined by its inherent "signal aspect." As a result of these characteristics, the "isolated evils" which accompany secondary picketing (and which Congress sought to regulate) are absent where other avenues of communication are utilized.

[21] "*Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution . . . ."

A. *Secondary Picketing Has No First Amendment Protection Because It Is Largely Conduct and Because Its "Signal Aspects" Undermine Its Communicative Value.*

The Court has consistently distinguished picketing from pure speech because of picketing's "conduct" element. Mr. Justice Douglas, in his concurring opinion in *Bakery Drivers Local 802 v. Wohl,* pointed to the "speech plus" aspect of picketing as justifying regulation: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality . . ." 315 U.S. 769, 776-77 (1942); *see also Carpenters & Joiners Union Local 231 v. Ritter's Cafe,* 315 U.S. 722, 726 (1942). In a later opinion the Court stated unequivocally that picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech." *International Brotherhood of Teamsters Local 309 v. Hanke,* 339 U.S. 470, 474 (1950); *see also Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 501 (1949). As a result of the "compulsive feature inherent in picketing", it has a character beyond "mere communication as an appeal to reason. . . ." *Hughes v. Superior Court,* 339 U.S. 460, 468 (1950).[22]

The courts not only have differentiated picketing from pure speech, but have also treated picketing differently than handbilling, which also involves conduct. Handbilling, entitled to First Amendment protection (*see Organization for a Better*

[22] On numerous occasions since *Hughes,* the Court has reaffirmed the distinction between picketing and pure speech. *See Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973); *California v. La Rue,* 409 U.S. 109, 117 (1972); *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313 (1968); *United States v. O'Brien,* 391 U.S. 367, 376 (1968); *Cox v. Louisiana,* 379 U.S. 536, 555-56 (1965); *International Brotherhood of Teamsters Local 695 v. VOGT, Inc.,* 354 U.S. 284, *rehearing denied,* 354 U.S. 945 (1957).

Austin v. Keefe, 402 U.S. 415 (1971)), in some situations has

been allowed to take place in spite of restrictions on picketing. For instance, the Court of Appeals for the Second Circuit held that the right to distribute handbills and talk to applicants in a welfare office constituted protected "pure speech", while picketing in the same area would not have been permissible. *Albany Welfare Rights Organization v. Wyman,* 493 F.2d 1319, 1324 (2d Cir. 1974).[23]

The lessened degree of First Amendment protection for picketing is attributable both to picketing's "signal aspect" and the more intrusive characteristics of picket lines.

The "signal aspect" of picketing is discussed in detail, *supra* pp. 7-21. The message conveyed by the physical presence of pickets—"Do Not Patronize"—is far stronger than the contradictory written placards. Because of this "signal aspect", the Court has recognized that communication by "publication in a newspaper, or by distribution of circulars," results in a more effective conveyance of a message. *Hughes v. Superior Court,* 339 U.S. 460, 466 (1950). The Court thus drew the picketing/nonpicketing distinction several years prior to Congress' decision to draw the same distinction in the Act's publicity proviso. The Court of Appeals for the Third Circuit also drew this distinction in *K&K Construction Co. v. NLRB,* 592 F.2d 1228, 1234 n.6 (1979):

> Handbilling and other forms of publicity, on the other hand, are not likely to have the signal aspect of labeling the neutral as unfair. . . . Moreover, handbilling and other informational devices are better adapted at truthfully advising the public. [Citation omitted.]

Congressional differentiation between picketing and other forms of communication therefore is a rationally-based and constitutionally-sound decision. Section 8(b)(4)(ii)(B), banning all secondary picketing, is purely *conduct* and not *content* oriented.

[23] The Court in *Tree Fruits* implicitly recognized the greater First Amendment protection accorded handbilling since "publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him . . ." (377 U.S. at 70) was permitted, while picketing seeking the same result was prohibited.

The Congressional regulation cannot be attacked as an infringement of "commercial speech", as the Union argued below. First, the Union cannot show that secondary consumer picketing merely proposes a commercial transaction and nothing more. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973). Second, the Union cannot persuasively argue that the consumer's right to receive information would be hampered, especially when alternative and more effective avenues of communication are present. Third, regulation of the type of misleading message which results from secondary picketing is proper. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 383, *reh. denied,* 434 U.S. 881 (1977). Finally, as the Court has repeatedly stated, picketing is far different from pure speech, and can be regulated or even banned if another protected interest is strong enough.

B. ***Any Alleged Infringement of the Communicative Aspects of Secondary Consumer Picketing Is Alleviated by the Presence of Effective Alternative Means of Communication to Consumers.***

The availability of alternative means of communication, other than the regulated means, is a factor considered by the Court in balancing the First Amendment rights of unions against the rights of neutral employers to be free from the economic hardship of secondary boycotts. *See Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972); *Local 761, International Union of Electrical Workers v. NLRB,* 366 U.S. 667, 672 (1961).[24] The Court has held that the presence of alternative means of communication may sanction governmental regulation of speech:

> [W]e regard the available "alternative means of (communication as) a relevant factor" in a case such as this where

[24] *See* Note, 54 J. Urb. L. 579, 596 (1977).

> "we (are) called upon to balance First Amendment rights against (legitimate) governmental . . . interests." *Kleindienst v. Mandel,* 408 U.S. 753, 765 (1972).

Pell v. Procunier, 417 U.S. 817, 824 (1974). *See also Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972); *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

The "publicity proviso" of the Landrum-Griffin Act expressly provides that all methods of communication other than picketing are available truthfully to advise the public that the union has a dispute with the producer of a particular product carried by the neutral business. These alternative means of conveying factual information to consumers have been recognized as far more effective, more believable, and less volatile than picketing.

Mr. Justice Harlan, in his dissent in *Tree Fruits,* looked to this factor as one which had a substantial effect on the constitutionality of the picketing ban:

> The decision of Congress to prohibit secondary consumer picketing during labor disputes is, I believe, not inconsistent with the protections of the First Amendment, particularly when, as here, other methods of communication are left open.

377 U.S. at 93.

The Union may argue that it has the right to utilize the "most effective means" available to publicize its dispute. We submit that the Union's desire to use the "most effective means" is not a First Amendment claim. Rather, it is an admission that picketing can accomplish something more than could be accomplished by pure speech alone—*i.e.,* a boycott of the neutral without regard to the stated message. For this very reason 8(b)(4)(ii)(B) was enacted and should be enforced here.

C. *In View of the Substantial Support for Congress' Determination that Picketing Differs from Other Methods of Communication, the Court Should Defer to Congress' Judgment.*

Congressional determinations in the area of constitutional rights, when these rights are affected by the Commerce Clause, are entitled to judicial deference, particularly where, as here, Congress has a rational basis for such determination. *Katzenbach v. Morgan,* 384 U.S. 641, 653 (1966); *Katzenbach v. McClung,* 379 U.S. 294, 300 (1964). In view of the fact that the Act is narrowly drawn to preserve effective First Amendment communications which lack the evils of secondary picketing, this historical deference should obtain in the area of secondary picketing. *Cf. United States v. Rabel,* 389 U.S. 258, 268 (1967).

As Mr. Justice Harlan stated in his dissent in *Tree Fruits:*

> Congress has given careful and continued consideration to the problems of labor-management relations, and its attempts to effect an accommodation between the right of unions to publicize their position and the social desirability of limiting a form of communication likely to have effects caused by something apart from the message communicated, are entitled to great deference.

377 U.S. at 93.

The Landrum-Griffin Act does not place a sweeping, inexact ban on picketing, but rather proscribes only picketing calculated to have effects apart from the ideas expressed. The Congressional judgment that the effects of secondary consumer picketing are undesirable provides the basis for the limitation. The Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech..." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 36 (1973) (emphasis in original).

Merely because the Congressional regulation reaches consumer picketing as well as employee-directed picketing does not deprive it of constitutionality:

> Congress regarded the pressuring of a secondary *employer* as much an evil as efforts to induce or encourage his employees to strike or not handle goods. The aim of the law is to free interstate commerce from the disruptive consequences of labor strife. In the legislative judgment, to 'signal' *persons* into a sympathetic refusal to handle goods is no more obstructive than to bring about the same ultimate objective . . . through coercive pressures on the secondary employer. . . . When the purpose of the conduct is the same, it is for Congress to determine that similar restraints may be imposed.

Burr v. NLRB, 321 F.2d 612, 622 (5th Cir. 1963) (emphasis in original).

Just as the statutory prohibitions of general secondary picketing and recognitional picketing are constitutional, *IBEW Local 501 v. NRLB,* 341 U.S. 694 (1951); *International Brotherhood of Teamsters Local 344 v. NLRB,* 568 F.2d 12 (7th Cir. 1977), so too is the prohibition of secondary consumer picketing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Legislative History of 8(b)(4) Application to Secondary Consumer Picketing

The Labor-Management Reporting and Disclosure Act[25] was the product of compromise between the Senate's Kennedy-Ervin bill[26] and the House of Representatives' Landrum-Griffin bill.[27]

The Landrum-Griffin bill proposed legislation regulating internal union affairs and contained amendments to the National Labor Relations Act[28] designed to close certain "loopholes" in Section 8(b)(4) of the NLRA. One of the often-cited loopholes was the failure of Section 8(b)(4) to effectively prohibit direct pressures against a secondary employer with the object of forcing it to cease doing business with the primary employer. The Administration Bill, introduced in the Senate by Senators Goldwater and Dirksen, closely paralleled the Landrum-Griffin bill.[29]

The Landrum-Griffin bill proposed amending Section 8(b)(4) of the NLRA to read, in part, as follows:

> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:
>
> . . .
>
> (B) forcing or requiring any person to cease, or to agree to cease, using, selling, handling, transporting, or otherwise

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[25] Pub. L. No. 86-257 73 Stat. 519 (1959).
[26] S.1555, 86th Cong., 1st Sess. (1959).
[27] H.R. 8342, as amended, 86 Cong., 1st Sess. (1959).
[28] National Act), 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act (1947).
[29] S.748, 86th Cong., 1st Sess. (1959).

> dealing in the products of any other producer, processor, or manufacturer, or to cease, or agree to cease, doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; . . .

Initially, the types of threats and coercion of secondary employers intended to be covered were not explained in detail by the sponsors of the legislation. On July 27, 1959, Congressman Griffin explained a portion of his bill:

> This section deals effectively with two of the most flagrant types of conduct engaged in to thwart the basic policy of the National Labor Relations Act—secondary boycotts and recognition or organizational picketing. One of the major defects in the Senate and committee bills is the fact that while they concede there is a problem, they deal with these abuses in such an ineffective manner that it can truly be said they do not deal with the basic evils at all. . . .
>
> It is clear from the legislative history of the Taft-Hartley Act that Congress meant to outlaw all secondary boycotts. Unfortunately, various judicial and administrative decisions have held that the present language of Section 8(b)(4) and Section 303 permit labor organizations to engage in some types of secondary boycotts with complete impunity. This has been one of the major weapons, as numerous hearings have disclosed, used by gangsters and racketeers who infiltrated the labor movement.

105 Daily Congressional Record 13091, July 27, 1959. *Reprinted in* 2 U.S. N.L.R.B. Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 1522 (1959) (hereinafter cited as Leg. Hist.).

On August 11, 1959 Congressman Griffin explained further:

> In . . . many other cases, a secondary boycott was used. You might ask, How could it have been used if Congress intended to outlaw secondary boycotts? The answer is that over the past 12 years a few gaping loopholes have developed. Our substitute bill is designed only to close up these loopholes.

105 Daily Congressional Record 14195, August 11, 1959. 2 Leg. Hist. 1568.

The Kennedy-Ervin bill, on the other hand, focused almost exclusively on internal union reforms since its supporters were opposed to any Taft-Hartley amendments.[30] The bill introduced in the Senate contained no amendments to the secondary boycott provisions of the Act.

Senators Goldwater, McClellan and Dirksen each attempted to gain approval of efforts to amend the Act so as to "plug loopholes." Their efforts prompted Senator Humphrey to express his "fears" concerning Senator Goldwater's amendment to the Kennedy-Ervin bill:

> This proposed amendment . . . deals then with an activity which is already regulated and regulated plentifully.
>
> . . .
>
> It is proposed now, however, that it be declared an unfair labor practice to threaten, coerce, or restrain any person to engage in a boycott.
>
> . . .
>
> [After a discussion of whether the amendment would reach leafletting of a neutral employer]

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[30] Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 258-59 (1959).

> To distribute leaflets at the premises of a neutral employer to persuade customers not to buy a struck product is one form of consumer appeal. To peacefully picket the customer entrances, with a placard asking that the struck product not be bought, is another form. I fear that consumer picketing may also be the target of the words "coerce, or restrain." I fear that, in addition to the existing foreclosure of the union on strike from making any effective appeal to the employees of the so-called neutral employer, the union by this amendment is now to be effectively sealed off from even an appeal to the consumers.

105 Daily Congressional Record 5579, April 17, 1959. 2 Leg. Hist. 1036.

On April 20, 1959, Senator McClellan discussed his proposed amendment to the Kennedy bill.[31] Senator McClellan stated:

> Then I propose to offer an amendment related to the secondary boycott, to strengthen the law so as to prevent any union official from saying to a customer of a manufacturer a thousand miles away from the scene of the dispute, "You can no longer handle the products of that manufacturer," and place a picket line around his establishment. It would prevent any union official from saying to such a businessman, "If you handle the products of a certain manufacturer, we will picket your place and shutoff your supplies, and embarrass customers who come here to deal with you."

105 Daily Congressional Record 5633, April 20, 1959. 2 Leg. Hist. 1052.

On April 21, 1959 Senator Goldwater commented on the Administration bill which was eventually defeated. Senator Goldwater stated:

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[31] Senator McClellan's amendment reflected his bill, S.1384, 86th Cong., 1st Sess. (1959).

> The administration bill has a broader purpose, namely, to curb the improper practices in the labor and management fields revealed by the Senate select committee . . .
>
> . . .
>
> The McClellan committee has heard a great deal of testimony as to how certain unions, particularly the Teamsters, have taken advantage of the inadequacies of the present secondary boycott provisions of the National Labor Relations Act to force employers to cease doing business with other employers of whom the union disapproves. Yet, S.1555 does nothing to correct these inadequacies.
>
> When the Taft Hartley Act was enacted in 1947, it was the intent of Congress to do away with secondary boycotts. Evidently Congress at that time overlooked some important fact situations leading to secondary boycotts—at least the Board and the courts consider that we did—and these have been seized upon by those intent upon circumventing the law to achieve objectives otherwise prohibited by the act.
>
> The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or to cease doing business with, another person.

105 Daily Congressional Record 5764, April 21, 1959. 2 Leg. Hist. 1079.

On April 24, 1959, Senator McClellan spoke in support of his amendment:

> Mr. President, we are all familiar with the problem known as secondary boycott. There have been some abuses in this field, and the amendment seeks to correct them.

Mr. President, I shall state what the amendment would prohibit which is not now prohibited, and how it would fill in the gaps in the Taft-Hartley law as it now operates. The amendment covers the direct coercion of secondary employers to cause them to cease dealing with or doing business with the primary employer. In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products of the plant where the labor dispute is under way.

. . .

The amendment, Mr. President, covers pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishing a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union. It is an effort to influence the original employer.

Mr. President, these cases come up repeatedly. There are those who believe that almost any power should be placed in and retained by unions to force their will, by the use of economic power and economic coercion, in almost any situation which may arise.

Mr. President, I have been pleading for this cause ever since the debate on the bill started. I have been trying to have adopted a measure to protect those who are innocent and helpless.

I point out that we have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some

other company. The merchant may have built up his trade entirely on that product. The merchant may have a competitor who is handling a competitive product made by another manufacturer, which serves the same function, but which is a different brand and is manufactured by someone else. In one of these plants there may be a strike, and the union may picket the merchant who is handling the product of the struck plant. The union may say to the merchant, "You cannot sell this product. If you do we will picket your place of business. Thus you will not be able to get your supplies, because the Teamsters will not cross the picket line."

In addition, the merchant's customers would be embarrassed. They would be harassed. They would see the picket sign. What would the sign say? It would say "Unfair to labor." How is the merchant unfair to labor? It is simply a case of the merchant not being willing to stop handling a product which he has been handling for 20 years and on which he has built his business. That is a secondary boycott which, it seems to me, ought to be prohibited.

105 Congressional Record 5970-71, April 24, 1959. 2 Leg. Hist. 1193-94.

Proposals in the Senate to add amendments to the secondary boycott provisions were defeated.[32] The Kennedy-Ervin bill was approved by the Senate on April 25, 1959.[33]

In the House on August 11, 1959, Congressman Thompson of New Jersey and Congressman Udall of Arizona targeted

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[32] Senator McClellan's amendment was defeated. 2 Leg. Hist. 1198.

[33] The Senate did adopt a section dealing with the "hot cargo" situation.

some very specific criticisms towards the Landrum-Griffin bill. They inserted into the Congressional Record on analysis which stated, in part:

> Section 702 of the Landrum bill denies freedom of speech.
>
> The bill provides that a union may not restrain an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts, and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sold Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.
>
> The Landrum bill forbids this elementary freedom to appeal to the general public for assistance in winning fair labor standards. The union apparently could be enjoined upon the ground it was coercing or restraining the retailer with the object of inducing him not to deal with the brewery; indeed, as I understand it, one of the acknowledged purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute.
>
> This is a basic infringement on freedom of expression.

105 Daily Congressional Record 14203, August 11, 1959. 2 Leg. Hist. 1576.

It should be observed, however, that the dispute in the House of Representatives centered on whether to substitute the Landrum-Griffin bill for the bill reported by the Committee on

Education and Labor, H.R. 8342. Both proposals were understood to prohibit secondary boycott picketing. Congressman LaFare, a member of the House Committee on Education and Labor, explained the committee's bill on March 11, 1959 (eventually replaced by the Landrum-Griffin bill):

> Although (B) of my bill is different from (B) in the present Taft-Hartley Act, it is taken from the second clause of Taft-Hartley's subsection 8(b)(4)(A). It reads:
>
> > (B) causing or attempting to cause any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing busines with any other person.
>
> The new subsection (B), however, is more compact than the language of the present subsection (A). It also leaves no doubt that it is intended to protect secondary employers such as distributors, dealers, wholesalers, jobbers, and others from secondary boycott pressure.
>
> For example, let us assume that there is a labor dispute between a union and a maker of electrical fixtures. Unable to win its dispute fairly, the union enlists the cooperation of unions engaged in the construction industry. The construction unions advise contractors that they will be courting labor trouble if they continue to use electrical fixtures made by the manufacturer who is having a labor dispute with the electrical union. The construction unions point out to the contractors that they do not have to cease doing business with the jobber or distributor of the electrical fixtures, but merely require the distributor to order fixtures which are not made by the alleged "unfair" manufacturer.
>
> If the distributor handles only one line of fixtures, it means that the contractor is forced to stop doing business with the distributor—both of whom are completely neutral

and innocent in the primary labor dispute. Such a distributor faces bankruptcy if the union's coercion is great enough.

Where the distributor handles more than one line of fixtures, it might be contended that the coercion or threat is not designed to force the contractor to cease doing business with the distributor, but that he is merely being asked to provide one brand of a product instead of another.

My bill would make such activity a secondary boycott violation and an unfair labor practice.

105 Daily Congressional Record 3511, March 11, 1959. 2 Leg. Hist. 1471.

On the floor of the House on August 12, 1959, a particularly revealing exchange took place between Congressmen Brown and Griffin:

Mr. BROWN of Ohio. Mr. Chairman, I should like to propound a question either to Mr. Griffin or to Mr. Landrum, the authors of one of the bills, relative to secondary boycotts. If I understood their testimony before the Committee on Rules correctly, the authors of this bill stated their bill will deal properly with secondary boycotts.

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. BROWN of Ohio. That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. GRIFFIN. Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN of Ohio. But the Griffin-Landrum bill would?

Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. BROWN of Ohio. Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing...

Mr. BROWN of Ohio. Advertising.

Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

Mr. BROWN of Ohio. Would either of the other two bills cover it?

Mr. GRIFFIN. Absolutely not; they would make no change in the existing law on that point.

105 Daily Congressional Record 14339, August 12, 1959. 2 Leg. Hist. 1615.

The House approved the Landrum-Griffin bill on August 15, 1959.

On August 20, 1959 Congressman Thompson of New Jersey inserted into the Congressional Record an analysis (prepared by Senator Kennedy and Congressman Thompson) comparing the Landrum-Griffin bill with the Senate bill:

> The House bill provides that a union may not "restrain" or "coerce" an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sell Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

> The House bill outlaws such appeals to the general public for assistance in winning fair labor standards. The union apparently could be enjoined upon the ground that it was "coercing" or "restraining" the retailer with the object of inducing him not to deal with the brewery; indeed, one of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. The portions of the House bill which have this effect are unacceptable.

105 Daily Congressional Record 15223, August 20, 1959. 2 Leg. Hist. 1708.

The House and Senate bills (respectively the Landrum-Griffin and Kennedy-Ervin bills) were sent to a conference committee for compromise of the differences. Prior to House passage of Landrum-Griffin, President Eisenhower delivered a radio speech to rally support for Taft-Hartley amendments. On August 6, 1959 he stated:

> You know, a great deal is being said and written about this subject. We hear one bill called a "weak" bill, another, a "strong" bill, and so on. The American people are not interested in adjectives, or in labels. They are interested in a law which will eliminate the abuses.
>
> I want only effective protection from gangsters and crooks for the people of America—for the men and women who labor with their hands, their minds, their energies, to make America a better place for themselves and for their children.
>
> . . .
>
> To date, legislation to correct these deplorable conditions has not been enacted. Meanwhile the evidence of abuses has continued to mount before Congressional committees.

Chief among the abuses from which Americans need protection are the oppressive practices of coercion.

. . .

[Eisenhower then discussed "blackmail" recognitional picketing.]

Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself unscrupulous organizing official in this case use another scheme. They picket the stores which sell the furniture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

How can anyone justify this kind of pressure against stores which are not involved in any dispute? They are innocent bystanders. This kind of action is designed to make the stores bring pressure on the furniture plant and its employees—to force those employees into a union they do not want. This is an example of a "secondary boycott."

I want that sort of thing stopped, so does America.

The blackmail picket line and the secondary boycott cannot possibly help the working men and women of America.

. . .

The bill which passed the Senate in April is not effective. It does not deal with or curb the picketing or boycotting practices I have described.

. . .

In the House of Representatives the Labor Committee bill is even less effective than the Senate bill. It, too, fails to deal with picketing and boycotting practices I have described.

. . .

Neither the Senate bill nor the House committee bill will really curb the abuses the American people want to see corrected.

However, Congress need not limit itself to such a choice.

The Administration bill is still before the Congress. There is also before the House a bipartisan bill jointly sponsored by two members of the House Labor Committee—Mr. Landrum of Georgia, a Democrat, and Mr. Griffin of Michigan, a Republican. The Landrum-Griffin bill is a good start toward a real labor reform bill, containing many of the corrective provisions I have urged.

New York Times, August 7, 1959. 2 Leg. Hist. 1842-43.

The President's speech placed considerable pressure on the Senate conferees to accept the House position on the Taft-Hartley amendments.[34] During the conference committee's deliberations, Senator Kennedy returned to the Senate for instructions for the Senate conferees. Until this time, Landrum-Griffin had not contained a publicity proviso. Senator Kennedy proposed that the Senate offer the following proviso as its position:

> *Provided,* That nothing contained in this subsection (b) shall be construed . . . to prohibit publicity for the purpose of truthfully advising the public (including consumers) that an establishment is operating, or goods are produced or distributed, by an employer engaged in a labor dispute, without inducing employees to refuse to pick up, deliver or transport any goods, or perform any services in such establishment. . .

A colloquy between Senators Kennedy and Dirksen sheds some light on the genesis of the proviso:

> Mr. DIRKSEN. I do not expect to discuss here very many of the provisions which are not in the Landrum-

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[34] Cox, *supra* Note 30, 44 Minn. L. Rev. at 260.

Griffin bill or in the Senate bill. Some of these provisions are not in either, as I recall. But here is my difficulty: We got into a tizzy in the illustration used about a mattress plant located, let us say, in Raleigh, N.C., which has a very good customer in St. Louis, Mo. They have a labor dispute in Raleigh, and the pickets show up at the customer's plant in St. Louis. We spend a day discussing what shall appear on the signs. Can they put something in the newspapers? Can they go on the radio?

Mr. KENNEDY. We agreed to that. It is not a part of our resolution.

Mr. DIRKSEN. It is a question of customer picketing.

Mr. KENNEDY. That is right. In that case, we have receded on the question of consumer picketing of a secondary employer.

Now we are going quite far in limiting the right of unions, the traditional right to carry on picketing. And I will say to the Senator that on that point which he raises we have already agreed to the House position.

105 Daily Congressional Record 15901, August 28, 1959. 2 Leg. Hist. 1378.

The present language in 8(b)(4) was the compromise product of the conference committee:

> (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is
>
> . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .
>
> . . .

> Provided further, That for the purposes of this paragrapn (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . .

H.R. Rep. No. 1147, 86th Cong. 1st Sess. 38 1 Leg. Hist. 942.

Senator Kennedy reported, September 2, 1959, on the final outcome of the conference committee. Speaking to the changes made in the Landrum-Griffin bill, he stated:

> Secondly, the House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant.
>
> We quite obviously are opposed to their affecting liberties in a secondary strike or affecting employees joining, but the House language prohibited not only secondary picketing, but even the handing out of handbills or even taking out an advertisement in a newspaper.
>
> Under language of the conference, we agreed there would not be picketing at a secondary site. What was permitted was the giving out of handbills or information through the radio, and so forth.

105 Daily Congressional Record 16254-55, September 2, 1959. 2 Leg. Hist. 1388-89.

Senator Morse was quite disappointed with the compromise bill. In a long speech expressing his remaining disagreements, he noted the following with respect to consumer picketing:

> This bill does not stop with threats and illegalizing the hot cargo agreement. It also makes it illegal for a union to "coerce, or restrain." This prohibits consumer picketing.

What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, "Do not buy X shoes." This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer.

. . .

We take a long and backward step when we illegalize consumer picketing. It is not enough to say that the union can make its appeal by newspaper advertisements and leaflet distribution. Advertisements are expensive, and both may be ineffective to quickly and dramatically catch the public's eye. Picketing is usually the only effective way of reaching the consumer at the only place where it matters—where the product is sold and at the time that the customer is interested in buying it. When we prohibit consumer picketing we compel the public, through ignorance of the situation, to side with the employer rather than the union. We prevent the consumer from making his own choice.

How retrogressive this bill is can be seen from the fact that even publicity other than picketing—leaflets and advertisements—is curbed. For the bill permits "publicity, other than picketing, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer" not to work at the place where the product is sold. Two things should be observed about this limitation. First of all, by excepting picketing, it acts on the assumption that consumer picketing inevitably and always causes employees not to work as well as customers not to buy. This is a false assumption, and experience has demonstrated its falsity.

. . .

Secondly, whatever the effect of publicity other than picketing, we are quite without constitutional power to prohibit free speech because of that effect. [Morse then quoted from *Thornhill v. Alabama*].

. . .

Certainly picketing in many instances is very effective. That is why antilabor employers wish to get rid of it. Certainly, Mr. President, public knowledge of labor practices on the part of an employer, as disclosed by picket signs, sometimes proves to be very embarrassing to the employer, particularly when the public proceeds to investigate and discover what the facts are.

105 Daily Congressional Record 16397, September 3, 1959. 2 Leg. Hist. 1426-27.

On September 3, 1959, Senator Kennedy, during Senate debate on the conference report, noted the following:

Third. Secondary boycotts: The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes. The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:

. . .

(c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling

goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 Daily Congressional Record 16413-14, September 3, 1959. 2 Leg. Hist. 1431-32.

The Senate approved the conference report on September 3, 1959. 105 Daily Congressional Record 16435. 2 Leg. Hist. 1453.

During consideration in the House, Congressman Thompson of New Jersey listed fifteen of the "most important improvements" made by the conferees to the House's Landrum-Griffin bill:

> 2. Consumer appeals: The right to publicize nonunion goods to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for consumer boycott would have been barred by House bill.

105 Daily Congressional Record 16635, September 4, 1959. 2 Leg. Hist. 1720. Following this, Congressman Thompson summarized in some detail "eight major points":

> 3. Secondary boycotts: The secondary boycott provisions of the House bill would have curtailed legitimate union activities. Accordingly, the conferees insisted that the report secure the following-rights: . . .

> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

105 Daily Congressional Record 16636, September 4, 1959. 2 Leg. Hist. 1721.

On the same day Congressman Udall noted the following on the floor of the House:

> In addition, the conferees wisely set out to plug the few remaining loopholes in the secondary boycott provisions of the Taft-Hartley Act without impinging upon basic rights vital to some segments of the labor movement. Hence, the amendments adopted in conference: . . . (c) protect the free speech right to appeal to consumers by nonpicketing methods.

105 Daily Congressional Record 16637, September 4, 1959. 2 Leg. Hist. 1722.

The House approved the conference report on September 4, 1959, and President Eisenhower signed the bill into law on September 14, 1959. 105 Daily Congressional Record 16653-54; 2 Leg. Hist. 1738-39. Pub.L., No. 86-257.

Several congressmen and Senators published summaries of the final bill. For example, Senator Goldwater, on September 9, 1959, inserted into the Congressional Record a comparison of the Landrum-Griffin bill, the Kennedy-Ervin bill and the conference agreement. With respect to Title VII (amendments to the National Labor Relations Act) and specifically with respect to secondary consumer picketing, this summary analysis stated as follows:

> III. Other secondary boycotts. . .
>
> . . .
>
> 4. [House bill-Landrum-Griffin] Prohibits secondary customer picketing at retail store which happens to sell

product produced by manufacturer with whom union has dispute.

. . .

[Conference Agreement] Adopts House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott.

105 Daily Congressional Record 17181, September 9, 1959. 2 Leg. Hist. 1454.

Senator Everett Dirksen, the minority leader in the Senate and supporter of Taft-Hartley amendments, stated the following in his "extension of remarks":

> [The bill] bars a union from picketing a retail store to advertise that the store is handling the goods of a firm the union was striking, but permits other forms of such advertising—handbills, for example—if they do not cause the store's employees to stop working or prevent pickups and deliveries.

105 Daily Congressional Record A827, September 18, 1959. 2 Leg. Hist. 1823.

Senator Paul Douglas of Illinois, opponent of Taft-Hartley amendments, noted in an extension of remarks:

> While picketing at secondary-boycott sites is outlawed, the House bill went further and would even have prevented the passing out of handbills or ads in the newspapers. This provision in the House bill was changed so that handbills, radio programs, advertisements, etc., aimed at the public, including consumers, would at least be permitted in these secondary situations. I think that is proper and an exercise of our constitutional rights of free speech.

105 Daily Congressional Record A8372, September 24, 1959. 2 Leg. Hist. 1834.

Senator Goldwater made the following comments in an extension of remarks on October 2, 1959:

> This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute. But even this permitted—but limited—type of union activity becomes unlawful if such publicity has an effect of inducing any individual employed by any person other than the producer, company A, in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the secondary employer who is engaged in such distribution, that is, the distributor, company B.

105 Daily Congressional Record A8523, October 2, 1959. 2 Leg. Hist. 1857.

FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

Public Citizen and the New York Public Interest Research Group hereby move this Court for leave to file the accompanying brief *amicus curiae* urging the Court to affirm the decision below. It is the position of *amici* that any restriction on the right of labor unions to peacefully picket at the premises of a retailer for the purpose of seeking consumer support for a boycott of the products of a firm with which the union has a dispute is constitutionally impermissible.

INTERESTS OF AMICI

Amici are two broad-based consumer organizations whose interests will be affected by the disposition of the present proceeding. Each *amicus* has a significant organizational interest in ensuring that information concerning the existence of labor disputes is available to consumers in the form and in the manner in which it is most effective — through informational picketing at retail outlets. This information is needed so that members and supporters of *amici* may make purchasing decisions fully aware of the consequences of those decisions on ongoing labor disputes.

Public Citizen is a non-profit organization involved in a wide variety of activities on behalf of consumers. One of Public Citizen's foremost concerns has been to promote the free flow of information to consumers concerning, among other things, the price, quality, and availability of specific services. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), and the constitutionality of statutory prohibitions on drug price advertising, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). Public Citizen has also submitted *amicus* briefs in *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *In re Primus,* 436 U.S. 447 (1978); and *Village of Schaumburg v. Citizens for a Better Environment,* No. 78-1335 (February 20, 1980), each of which affirmed that the public has an independent right of access, secured by the First Amendment, to certain information of concern to consumers. Public Citizen is supported by contributions from approximately 40,000 individuals annually, many of whom are members of labor unions or

who support such organizations and who thus have an interest in being informed about the existence of labor disputes. The New York Public Interest Research Group ("NYPirg") is a non-profit consumer organization active in a broad range of areas. NYPirg has over 200,000 members and contributors, many of whom are also members or supporters of labor unions and thus have an interest in being advised about labor disputes.

The interests presented by *amici* in this case are the interests of consumers in establishing that the right of unions to engage in peaceful picketing to seek consumer support for a boycott of the products of a firm with which the union has a dispute cannot be abridged consistent with the First Amendment. *Amici* are also concerned about the effect of an adverse ruling on picketing to promote consumer boycotts in other contexts. If this Court rules that peaceful picketing designed to enlist consumer support properly may be banned, the government may next attempt to prohibit others, especially consumer groups and other advocacy organizations, from picketing to espouse their views, an effort that would raise most serious First Amendment difficulties. For these reasons, the presentation of *amici's* views in the accompanying brief will assist the Court in considering the important constitutional issues raised in this action from a different viewpoint than respondents.

Respectfully submitted,

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March 29, 1980

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BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND NEW YORK PUBLIC INTEREST RESEARCH GROUP

INTERESTS OF *AMICI*

The interests of amici are set out in the accompanying motion for leave to file this brief *amicus curiae.*

PRELIMINARY STATEMENT

Amici agree fully with respondent Retail Store Employees Union, Local 1001 and the majority below that the informational picketing involved in this case is not one of the "isolated evils" at which section 8(b) (4)

(ii) (B) is directed. *See NLRB v. Fruits & Vegetable Packers, Local 760,* 377 U.S. 58 (1964) (*"Tree Fruits"*). Rather, we submit that as this Court stated in *Tree Fruits,* where, as here, the picketing is plainly directed at the products of the primary, not the secondary, employer, the picketing falls outside the narrow proscription in section 8(b) (4) (ii) (B). Therefore, this Court must reach the constitutional issue only if it rejects respondent's statutory argument, which this brief will not discuss. However, the very existence of these serious constitutional questions constitutes a further basis for sustaining respondent's position on the statutory construction issue. *See Johnson v. Robison,* 415 U.S. 361, 367 (1974); *United States v. Thirty-seven Photographs,* 402 U.S. 363, 369 (1971).

SUMMARY OF ARGUMENT

This case presents the question of whether the National Labor Relations Board ("petitioner" or the "Board") may, consistent with the First Amendment, prohibit labor unions from picketing peacefully at the premises of retailers for the purpose of urging the public to boycott the products of the company with which the union has a dispute, solely because the retailer sells predominantly the struck firm's products. Petitioner contends that this form of informational picketing is proscribed under section 8(b) (4) (ii) (B) of the National Labor Relations Act, 29 U.S.C. § 158(b), because, according to petitioner, the foreseeable result of the picketing will be to persuade the retailer's customers to cease dealing with the retailer altogether.

Amici submit that this Court should reject the construction of section 8(b) (4) (ii) (B) urged by petitioner,

and thereby avoid serious constitutional questions. These questions will necessarily arise because picketing has traditionally been afforded substantial First Amendment protection, and the proposed ban can be sustained only if it is narrowly drawn to meet a compelling state interest. *Thornhill v. Alabama,* 310 U.S. 88 (1940). As the majority below correctly observed, petitioner's construction of section 8(b) (4) (ii) (B) launches it toward a head-on confrontation with the First Amendment. *See also Tree Fruits, supra* 377 U.S. at 63; *id.* at 76 (concurring opinion of Mr. Justice Black). Not only would the right of unions to inform the public of a dispute be abridged, but so would the public's independent and equally strong right to be informed. In addition, the picketing ban sought by petitioner would undermine the associational rights of consumers, because many consumers, if advised, would exercise their right to support the union by boycotting the struck products.

When viewed in light of these serious constitutional flaws, it is apparent that the justifications offered for the ban are not compelling. The only interest served by the ban is the economic interest of retailers being picketed. But this Court has historically disfavored efforts to elevate economic concerns over those rights secured by the First Amendment. Nor is the justification any more compelling than that mustered for many other restrictions on speech struck down by this Court in recent years. Equally unavailing is petitioner's contention that there is no abridgment here because other means of communication are unaffected by the ban. Not only does this argument overlook the clear advantages to picketing and its special significance in labor disputes, but this precise argument has been repeatedly rejected by this Court when made in a First Amendment context.

ARGUMENT

ANY RESTRICTION ON THE RIGHT OF UNIONS TO PICKET THE PREMISES OF RETAILERS FOR THE PURPOSE OF ENLISTING PUBLIC SUPPORT FOR A BOYCOTT OF THE PRODUCTS OF THE FIRM WITH WHICH THE UNION HAS A DISPUTE WOULD VIOLATE THE CONSTITUTION.

There can be no dispute that picketing, even in the context of labor disputes, is protected First Amendment activity. *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972); *Teamsters Union v. Newell,* 356 U.S. 341 (1958). Accordingly, any attempt to restrict the right of unions to engage in picketing to enlist public support is unconstitutional unless it can survive the "exacting scrutiny" required by the First Amendment. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978). Petitioner must therefore shoulder the burden of proving that the restriction on the right of unions to picket is both directly related to the advancement of a compelling governmental interest and is closely tailored to that interest in order to minimize interference with First Amendment rights. *Thomas v. Collins,* 323 U.S. 516, 540-41 (1945); *see also Elrod v. Burns,* 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo,* 424 U.S. 1, 25 (1976); *NAACP v. Button,* 371 U.S. 415, 438-39 (1963); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960); *Talley v. California,* 362 U.S. 60, 62-64 (1960); *see generally* Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 474 (1969).

While not conceding that First Amendment interests are even implicated, petitioner defends the picketing ban on the ground that it is both necessary to protect secondary employers from economic harm and is narrowly

drawn to achieve that end. Petitioner also suggests that there is no abridgment of First Amendment rights because the union remains free to avail itself of other means of advising consumers about its strike, such as handbills or leaflets. However, when viewed in light of the important societal interests in promoting the free flow of information relating to labor controversies, it becomes evident that the justifications offered by petitioner cannot withstand the "exacting scrutiny" the First Amendment demands.

In the first place, in addition to the union's right to inform the public of its dispute with an employer and seek the public's support, citizens have an independent and equally compelling right to receive information and make informed choices based on such information. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 756-57 (1976) (the First amendment affords protection "to the communication, to its source and to its recipients both"); *Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindienst v. Mandel,* 408 U.S. 753, 762-63 (1972). It can hardly be doubted that the public has a strong interest in being informed of the existence of a labor controversy. Millions of Americans belong to labor unions. Millions more are sympathetic to their efforts and lend support to unions in a variety of ways during labor-management disputes. For these citizens, the fact that a labor dispute exists is, and historically has been, a vital concern, one that most assuredly affects purchasing decisions and is therefore comparable to the interest a consumer has in the price of pharmaceuticals, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* the availability and cost of legal services, *see Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *In re Primus,* 436 U.S. 412 (1978), or

in knowing that particular real estate is for sale, *see Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). Thus, picketing geared toward informing the public of the existence of a labor dispute and enlisting public support is entitled to at least the qualified protection afforded to the various forms of "commercial" speech protected in these cases.

Moreover, because of the strong political and social overtones which are inherent in labor picketing, *amici* submit that this type of informational picketing is entitled to even greater protection. This Court has repeatedly emphasized in a series of cases, antedating the recent commercial free speech decisions, that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *E.g., Thornhill v. Alabama, supra,* 310 U.S. at 102.

Indeed, in *Tree Fruits* this Court warned that "a broad ban against picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63; *see also id.,* 377 U.S. at 76 (concurring opinion of Mr. Justice Black). To preserve the "uninhibited, robust, and wide-open debate" which has traditionally characterized the give and take in labor disputes, this Court has found it appropriate to adopt "by analogy" the standards of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), to govern libel actions arising in labor disputes covered by the federal labor laws. *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966). And this Court has recently reaffirmed the principle that the right to engage in expressive activity to promote political or social goals is deserving of the full range of First Amendment protections. *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 776. *See also Thornhill v. Alabama, supra,* 310 U.S. at 101-102; *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 764. Thus, since labor picketing necessarily involves substantial elements of political speech, it is entitled to considerable First Amendment protection.

The picketing restriction urged by petitioner goes beyond abridging the right of speech, however. Because of the nature of the picketing — to enlist the public's aid — petitioner's ban also serves to infringe upon the associational rights of those consumers who, if advised of the dispute, would choose to assist the union by boycotting the struck products. As Mr. Justice Harlan noted in his dissent in *NAACP v. Button,* 371 U.S. 415, 452-53 (1963), "[f]reedom of expression embraces more than the right of the individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. . . ." *See also Buckley v. Valeo,* 424 U.S. 1, 15, 25 (1976). The picketing limitation seriously infringes that right by interfering with the flow of vital information, just at the point where the consumer must determine whether "to join with" the union in an effort to make the union's advocacy effective. By keeping consumers in the dark, the picketing ban thus not only deprives consumers of the right to support the union if they so choose, but also compels them, *unwittingly,* to support the employer. The end result, of course, is that the Board arrogates to itself the judgment of when citizens should be allowed to determine what role, if any, they wish to play in a labor controversy. *Amici* submit that this result is plainly antagonistic to basic notions of

personal freedom embodied in the First Amendment. *Cf. Village of Schaumburg v. Citizens for a Better Environment,* No. 78-1335 (February 20, 1980), slip op. at 17.

When arrayed against the constitutionally protected rights it infringes, the justification for the picketing ban falls short of being compelling. The sole governmental interest relied upon by petitioner is that of safeguarding the economic interests of retailers who sell the struck firm's products. However, economic justifications for submerging First Amendment rights have never fared well before this Court. Just recently, in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court found that a ban on the use of "for sale" signs could not be supported by the claim that it was needed to preserve property values, or even the racial integrity of the community. Similarly, in *Bates v. State Bar of Arizona,* 433 U.S. 350, 377-80 (1977), this Court was unpersuaded by the argument that economic concerns justified a ban on advertising by lawyers. Among the justifications proffered and rejected as uncompelling in *Bates* were the contentions that advertising would increase overhead costs, which would be passed along to the public, and that the cost of advertising would create a substantial barrier to entry, which would deter young attorneys from entering the market and entrench the more established members of the bar. Moreover, regardless of how characterized, the justification proffered by petitioner here is no more substantial than the support mustered for a number of other restrictions on speech which this Court has struck down in recent years. *See, e.g., First National Bank of Boston v. Bellotti, supra* (interest in preserving the integrity of the electoral process); *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, supra, (interest in maintaining high professional standards among pharmacists); *Buckley v. Valeo, supra* (interest in preserving integrity of electoral process).

Petitioner's fall-back argument — that there is no interference with First Amendment rights because "the Union was free to advise the public of its dispute with Safeco by distributing handbills at the neutral title companies' premises. . . ." (Pet. Br. at 24) — is similarly flawed. First, serious questions exist as to whether the restriction in fact "leave[s] open ample alternative channels of communication." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer council, supra,* 425 U.S. at 771. Picketing is highly visible, inexpensive, and is readily understood by the public. Moreover, the options available to unions — handbills, soundtrucks, and newspaper advertisements — can involve far more cost than picket lines manned by union members, and in any event are plainly less effective.

Second, this Court has rejected precisely this argument — that there is no abridgment when there are alternative channels available to the speaker and listener — in a number of cases. *See, e.g., Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93-95; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 757 n. 15; *Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974); *Healy v. James,* 408 U.S. 169, 183 (1972); *see also Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974). Indeed, petitioner cites no case where this Court has upheld a ban on one form of communication simply because alternative modes were available. The Board's argument also ignores the fact that the consequences of being denied the right to picket under these circum-

stances are considerable by any measure. Petitioner's position, if sanctioned by this Court, will effectively insulate industries in which sales to the public are conducted not by the struck company itself, but through dealerships, franchises or other agents, from labor picketing designed to promote public support for the union. As noted above, that result will take a substantial toll on the rights of unions and consumers to disseminate and receive information, and will interfere with the exercise of associational rights of both groups.

There is a further significant flaw in petitioner's argument. While the line between picketing struck goods and picketing the retailer is a bright one which can be drawn with precision and with which the union can comply on its own, the line petitioner urges this Court to draw is hardly clear. Indeed, under petitioner's view of the law, it will seldom be clear, especially to one without access to the retailer's books and records, whether the retailer's predominant product is that of the struck employer. Thus, unions will be saddled with the burden of determining, prior to picketing, the precise product mix of the retailer and the likely effect of picketing on its business. And the opportunity to stray is great here; not only is there room for the union to misjudge the product mix of the retailer, but also the test urged by the petitioner — *i.e.* that "the picketing, if successful, will . . . persuade the retailer's customers to cease dealing with it altogether" (Pet. Br. at 2) — is extremely speculative and thus will be difficult to apply. Consequently, it is likely, if indeed not inevitable, that unions will be chilled from picketing in far more cases than necessary, in effect creating a form of prior restraint. As a result, the situations in which the public remains in the dark about the existence and the nature of the dispute

will increase significantly because unions will fear to exercise their right to picket guaranteed by the First Amendment due to uncertainty over its legality.

Moreover, a finding that the activities of respondent in this case are not constitutionally protected would carry serious implications for other forms of picketing to promote consumer boycotts. Labor unions are not the only groups which use picketing to further their organizational goals. Consumer groups such as *amici*, as well as other advocacy organizations, frequently engage in picketing, both to inform the public and promote support for their concerns. Indeed, consumer groups often seek public support for a boycott of a particular firm's products. If this Court rules that petitioner may proscribe this form of informational picketing, that ruling may well be read as an open-ended invitation to states and municipalities to attempt to cut back on the right to picket in a number of other contexts. For this reason as well, *amici* urge this Court not to retreat from its prior decisions holding that picketing is entitled to substantial First Amendment protection.

* * *

The ultimate conclusion flowing from this discussion is that petitioner is seeking to impose a construction on section 8(b) (4) (ii) (B), which, if sanctioned by this Court, can only lead to the supression of information about which the public is vitally concerned. Prior decisions of this Court make it clear that the sole justification for the prohibition, to protect the economic position of retailers, cannot support the picketing ban. As this Court long ago observed: "[i]f there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced

silence. Only an emergency can justify repression." *Whitney v. California,* 275 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 97.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-672

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the major national federation of business and professional organizations, consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct membership in excess of 86,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

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* This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 42.

The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the Federal Government. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as *amicus curiae* in numerous cases before this Court.

The question presented in this case represents a recurrent and substantial problem which is of vital concern to the Chamber and its members. At issue is the continued viability of section 8(b)(4)(ii)(B) of the National Labor Relations Act, which Congress designed specifically to protect neutral parties from injury resulting from the labor disputes of others. The decision of the court below effectively deprives neutrals of that protection, and thus defeats the noble purpose for which the section was enacted. Necessarily, the Court's decision in this case will have a significant impact on the rights of many Chamber members, and their manner of doing business. It is for this reason that the Chamber respectfully submits its views.

RELEVANT STATUTORY PROVISIONS

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended,[1] provides in pertinent part, that it shall be an unfair labor practice for a union:

> [T]o threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> * * *
>
> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person .... *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

[1] 29 U.S.C. § 158(b).

It is further provided that:

> [N]othing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . .

ARGUMENT

I. THE LABOR BOARD PROPERLY FOUND THAT WHERE A UNION'S PICKETING HAS THE PREDICTABLE EFFECT OF INDUCING CUSTOMERS NOT TO TRADE WITH A NEUTRAL, SECTION 8(b)(4) IS VIOLATED.

A. Introduction

This case presents a question which strikes at the heart of the protections afforded by the National Labor Relations Act to innocent third parties from harm resulting from the labor disputes of others. At issue is whether a union, which has a labor dispute with one party, is permitted to engage in picketing which may effectively destroy the business of another, disinterested party. This question necessarily requires a focus on the legislative purpose in enacting the prohibitions on union secondary activity.

B. The Legislative History of Section 8(b)(4)

Section 8(b)(4) was added to the National Labor Relations Act in 1947 by the Taft-Hartley Amendments, and it is in the history of this enactment that Congress' purpose must in the first instance be sought. That history demonstrates Congress' deep concern with certain activities of labor unions which were deemed objectionable. In describing the secondary activity provisions of the Act, Senator Taft explained:

> This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

II Leg. Hist. of Labor Management Relations Act 1106 (1947).

It is thus clear that the principal purpose of section 8(b)(4) was to confine labor disputes to the parties with whom the conflict had arisen. The section was expressly designed to protect innocent third parties

from pressures generated by such conflicts, and Congress intended the proscriptions of the Act to be broad enough to realize this objective.

Similarly, the legislative history of the 1959 amendments to the Act reflect this earlier understanding. The amendments were intended to strengthen and reinforce the prohibitions on secondary activity contained in the Act. *See* II Leg. Hist. of Labor Management Reporting and Disclosure Act 1568 (1959) (remarks of Congressman Griffin). Addressing the provision which is now section 8(b)(4)(ii)(B), Senator Kennedy, who chaired the 1959 Conference Committee on the House and Senate bills to amend the NLRA, recognized Congress' intent to broadly prohibit secondary picketing when he stated:

> [T]he House bill prohibited the union from carrying on any kind of activity to disseminate informational material to secondary sites. They could not say that there was a strike in a primary plant. . . . *Under the present language of the conference we agreed that there would not be picketing at a secondary site.* What was permitted was the giving out of handbills or information through the radio, and so forth.

II Leg. Hist. of LMRDA 1389 (emphasis added). And, the objective to ban secondary picketing was acknowledged by other Members of Congress critical of the breadth of the provisions. *See NLRB* v. *Fruit Packers,* 377 U.S. 58, 85-88 (1964) (Harlan, J., dissenting); *National Maritime Union of America, AFL-CIO* v. *NLRB,* 346 F.2d 411, 416 (D.C. Cir.), *cert. denied,* 382 U.S. 940, *rehearing denied,* 382 U.S. 933 (1965).

It is therefore certain that Congress was deeply concerned with shielding neutral employers from the labor

disputes of others, and that section 8(b)(4)(ii)(B) was intended to be sufficiently broad to accomplish this objective.

Moreover, this Court has recognized that concern of Congress, expressed in its enactment of section 8(b)(4), with "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building Council,* 341 U.S. 675, 692 (1951). *See, e.g., Houston Contractors Ass'n* v. *NLRB,* 386 U.S. 664, 668 (1967); *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612, 624 (1967).

C. This Court's Decision in Tree Fruits and Its Progeny

This Court's decision in *NLRB* v. *Fruit Packers,* 377 U.S. 58 (1964) (hereinafter referred to as *"Tree Fruits"*), was relied upon by the court below to justify its reversal of the Labor Board, and bears heavily on the issue posed in this case. *Tree Fruits* concerned a union's picketing of the stores of a neutral employer, Safeway, in an effort to dissuade the public from purchasing apples packed by a firm with which the union had a dispute. The Labor Board held that section 8(b)(4)(ii)(B) prohibits all consumer picketing at the establishment of a neutral. According to the Board, the natural and foreseeable result of such picketing was to force the neutral to curtail or discontinue its purchases from the primary employer and, the Board believed, a union which engages in such activity effectively intends to bring about "this natural and foreseeable result." *Fruit & Vegetable Packers, Etc., Local 760,* 132 N.L.R.B. 1172, 1178 (1961).

Reversing the Board's decision, this Court acknowledged that the union's conduct fell within the literal

proscription of section 8(b)(4)(ii)(B), but held that the facts of the case did not warrant a finding that the Act had been violated. 377 U.S. at 71-72. In reaching this conclusion, the Court was seemingly impressed with the fact that, as a practical matter, the picketing had the limited effect of inducing a boycott of a single product which represented an insubstantial part of Safeway's entire business. The Court was not faced with, and made no attempt to analyze, the extent to which surrounding circumstances (such as the impact of the picketing and the nature of the neutral's business) should be considered in determining whether picketing violates the secondary provisions of the Act. The Court simply drew a distinction between picketing which persuades customers to cease all trading with the neutral, and picketing which is limited to dissuading the neutral's customers from purchasing the product of the primary employer who is the object of the union's dispute. Thus, the Court observed that:

> Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product.

377 U.S. at 70.

But this distinction, which fit neatly within the facts of *Tree Fruits,* where the struck product was such an insignificant part of the neutral's business that its entire business would not likely be affected by the picketing, becomes far more difficult to apply in cases such as the present where the product represents a substantial portion of the neutral's business. Mr. Justice Har-

lan perceived the difficulties inherent in the Court's analysis when he declared:

> The distinction drawn by the majority becomes even more tenuous if a picketed retailer depends largely or entirely on sales of the struck product. If, for example, an independent gas station owner sells gasoline purchased from a struck gasoline company, one would not suppose he would feel less threatened, coerced, or restrained by picket signs which said 'Do not buy X gasoline' than by signs which said 'Do not patronize this gas station.' To be sure Safeway is a multiple article seller, but it cannot well be gainsaid that the rule laid down by the Court would be unworkable if its applicability turned on a calculation of the relation between total income of the secondary employer and income from the struck product.

Id. at 83.

The Court did not address the hypothetical posed by Mr. Justice Harlan, and thus did not reach the issue now before the Court. However, the hypothetical demonstrates the difficult, if not impossible, task of applying the distinction drawn by the Court in *Tree Fruits* to more complex and varied factual settings, while adhering to Congress' purpose in enacting section 8(b)(4)(ii)(B).

Since *Tree Fruits,* the Board and the courts of appeals have had numerous occasions to examine the parameters of the Court's decision in varying factual settings. The Board has consistently held, correctly we believe, that *Tree Fruits* did not lay down an inflexible rule validating all picketing which is purportedly aimed at persuading the public not to purchase a "struck product." In the Board's view, union conduct is unlawful if it has the potential or predictable effect

of inducing neutrals to cease dealing with a primary employer.[2] Thus, the Board has found a violation of section 8(b)(4)(ii)(B) where a union picketed neutrals in an effort to dissuade customers from buying a product which constituted between eighty-one and ninety-eight percent of the gross income of the neutrals,[3] and where the struck product had become so incorporated in the business of the neutral that it was impossible for the consumer to boycott the struck product without also boycotting the neutral's entire business.[4]

Similarly, all of the appellate courts which have addressed the question, save the court of appeals below, have held that *Tree Fruits* is limited to its unique factual setting. Thus, in *Hoffman* v. *Cement Masons Union Local 337,* 468 F.2d 1187 (9th Cir. 1972), *cert. denied,* 411 U.S. 986 (1973), where the union picketed a secondary site urging the public not to buy homes built by a contractor with whom it had a dispute, the court held that, in *Tree Fruits*:

> The Supreme Court . . . approved picketing of retail food stores that was *narrowly confined to requesting consumers not to purchase the struck product, which was one of many products sold in the stores.* Instead, we have here a single product for sale by the secondary, the homes, a part of

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[2] Local 14055, Steelworkers, 211 N.L.R.B. 649 (1974), *enforcement denied,* 524 F.2d 853 (D.C. Cir. 1975), *vacated and remanded,* 427 U.S. 807 (1976), *complaint dismissed because of mootness,* 229 N.L.R.B. 302 (1977).

[3] *See* note 2, *supra.*

[4] American Bread Co., 170 N.L.R.B. 91 (1968), *aff'd,* 411 F.2d 147 (6th Cir. 1969); Honolulu Typographical Union No. 37, 167 N.L.R.B. 1030 (1967), *aff'd,* 401 F.2d 952 (D.C. Cir. 1968).

which, the masons' work, was produced under the disputed labor conditions.

> Congress determined that *when a union's interest in picketing a primary employer at a 'one product' site, was in direct conflict with the need to protect such neutral employers from the labor disputes of others, the neutral's interests would prevail.*

468 F.2d at 1191 (emphasis added; citations omitted). *Accord, NLRB* v. *Twin City Carpenters Dist. Council,* 422 F.2d 309 (8th Cir. 1970); *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969).

These decisions reflect a proper interpretation of section 8(b)(4)(ii)(B), consistent with the purposes of the section, and reasonably construe this Court's decision in *Tree Fruits.*

D. The Court Below Misapprehended the Scope of Tree Fruits and Reached a Result at Odds With the Purpose and Intent of Section 8(b)(4)

In the instant case, the union picketed five land title companies, each of which received ninety to ninety-five percent of its income from the issuance of title insurance policies underwritten by Safeco, the employer with which the union had a primary dispute. The small remaining portion of the business of each title company was ancillary to the issuance of the Safeco policies, and involved title searches and escrow services. The Board found that the title companies were neutrals in the dispute between Safeco and the union,[5] and that the union's action "would predictably involve a virtu-

[5] This finding was affirmed by the court of appeals below, —— F.2d ——, 101 L.R.R.M. at 3086-87, and is not before the Court.

ally complete boycott of the land title companies," thereby "dragging" the land title companies into the union's dispute with Safeco. 226 N.L.R.B. at 757. In finding a violation of section 8(b)(4)(ii)(B), the Board determined that both the character and the magnitude of the picketing in this case differed significantly from the picketing involved in *Tree Fruits.*

The Board in this case thus recognized the obvious and significant differences between the union's conduct in *Tree Fruits,* which was directed to a product representing a negligible part of the neutral's business, and the picketing herein which affected virtually the entire business of the title companies.

The court of appeals, however, read *Tree Fruits* as permitting all secondary picketing which is purportedly aimed at a struck product, without consideration of the circumstances surrounding such activity. Such a literal reading of this Court's opinions may, as the Court has acknowledged, lead to "absurd and unintended results." *Michigan* v. *Mosley,* 423 U.S. 96, 102 (1975). "[The] words of our opinions are to be read in the light of the facts of the case under discussion .... General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133 (1944). Indeed, the Court has expressly cautioned that rigid rules and broad generalizations are particularly inappropriate in section 8(b)(4) cases. *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674 (1961).

We submit that the court below has misapprehended the scope of *Tree Fruits* and that its decision contravenes the purposes of section 8(b)(4). The court's decision ignores the consequences of the picketing and, specifically, the impact which such picketing will neces-

sarily have on a company which relies substantially on the single product which is the object of the union's wrath.

Indeed, the court's decision permits unions to accomplish that which Congress has clearly forbidden them to do directly—to picket a neutral with which the union has no labor dispute. Such action is clearly an unlawful secondary boycott. Yet, the union's action in this case, sanctioned by the court of appeals, is identical in substance and effect. Allowing such picketing subverts the intent of Congress to establish a scheme which protects neutral employers from the labor disputes of others.

It is plainly clear that the union's conduct in the case at bar falls squarely within the proscriptions of section 8(b)(4)(ii)(B). The picketing was directed at a product which constitutes virtually the entire business of the neutral title companies; accordingly, the Board's finding that the picketing had the predictable effect of forcing the neutrals to cease dealing with Safeco, is clearly correct. The court of appeals declared that *Tree Fruits* does not permit the Board to examine the effect or impact of the picketing in assessing its legality. —— F.2d ——, 101 L.R.R.M. at 3092-93. In this respect, the court below is plainly mistaken. This Court has expressly held that union conduct is permissible, even if it entails some disruption of a secondary's business, but only where "*the foreseeable result* of the conduct could be, while disruptive, *so slight* that the 'cease doing business' requirement is not met." *NLRB* v. *Operating Engineers,* 400 U.S. 297, 304-05 (1971) (emphasis supplied). But where, as here, the foreseeable consequences of secondary activity are far greater than "slight," the union's conduct clearly

falls within the zone of activity prohibited by section 8(b)(4). *Id.* at 305.

Aside from the foreseeable consequences of the union's activity herein, it is equally clear that the picketing was intended to force a virtually complete cessation of the neutral's business with Safeco. This Court has acknowledged that, in secondary boycott cases, the nature of a union's action shows intent. *Electrical Workers* v. *NLRB,* 366 U.S. 667, 674. Where the action is directed at a substantial portion of the neutral's business, the "clear implication" of the union's conduct is to bring the neutral companies "to their knees" to force a change. *NLRB* v. *Operating Engineers,* 400 U.S. at 305. Indeed, it is difficult, if not impossible, to envision a clearer case than the present in which a union's conduct was designed to force the neutral companies to cease doing business with the primary employer.

These considerations compel the conclusion that the court below has mistakenly construed *Tree Fruits* well beyond its intended scope. The court's decision exalts form over substance in its view that *Tree Fruits* mandates the conclusion it has reached. By its failure to take account of the circumstances surrounding the picketing and the foreseeable results of the union's conduct, as required by section 8(b)(4)(ii)(B) and by this Court's decision in *NLRB* v. *Operating Engineers,* 400 U.S. at 304-05, the court below has effectively rendered the section a nullity and has deprived neutral parties of the protection which Congress believed necessary and desirable to afford.

As a result, we believe that the Court should make clear that its decision in *Tree Fruits* is limited to the

special circumstances present therein. Moreover, we urge the Court to accord full weight to the purposes underlying section 8(b)(4), namely, the protection from injury of neutral parties in labor disputes not their own. Accordingly, we submit that where the nature of the neutral's business, or of the secondary picketing, may predictably or potentially force a cessation of business, section 8(b)(4)(ii)(B) of the Act has been violated.

II. PROPERLY CONSTRUED, SECTION 8(b)(4) DOES NOT CONTRAVENE FIRST AMENDMENT PRINCIPLES.

The court below believed that its construction of section 8(b)(4)(ii)(B) was "necessary to avoid a possible confrontation with the First Amendment." —— F.2d ——, 101 L.R.R.M. at 3093. We urge that the court of appeals erred in its belief that its interpretation is mandated by constitutional principles. Properly construed to effectuate the purposes for which it was enacted, section 8(b)(4)(ii)(B) does not run afoul of constitutional limitations.

This Court long ago held that secondary picketing in violation of section 8(b)(4) of the National Labor Relations Act may constitutionally be enjoined. *Electrical Workers, Local 501* v. *NLRB*, 341 U.S. 694, 705 (1951). The Court more fully discussed the constitutional question in the context of consumer picketing in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), when it declared:

> [W]hile picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.

Id. at 464-65 (citation omitted).

The Court in *Hughes* concluded that, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted *or the purpose which it seeks to effectuate* gives grounds for its disallowance." *Id.* at 465-66 (emphasis added). In short, picketing in furtherance of an illegal objective, may constitutionally be prohibited.

That the prohibitions of section 8(b)(4)(ii)(B) are properly circumscribed in the constitutional sense is unmistakably clear. The limited regulation of union activity accomplished by the section furthers a legitimate objective of Congress to protect neutral employers from the coercive effects of the labor disputes of others. Moreover, as hereinbefore stated, proper application of section 8(b)(4)(ii)(B) is restricted to situations where the predictable effect of such picketing on the neutral's total business is more than insubstantial. Section 8(b)(4)(ii)(B) is further limited to picketing; other available means of communication are fully protected by the section's proviso which exempts from its prohibitions publicity, other than picketing, for the purpose of truthfully advising the public about a labor

dispute. *See Tree Fruits,* 377 U.S. at 93-94 (Harlan, J., dissenting).

These considerations have led the courts to conclude that the first amendment is not a bar to application of section 8(b)(4) to prohibit consumer picketing, where the intent or predictable effect of such picketing is to induce a cessation of trading with the neutral. *See, e.g., Hoffman* v. *Cement Masons Union Local 337, supra,* 468 F.2d at 1191 n.1; *Honolulu Typographical Union No. 37* v. *NLRB, supra,* 401 F.2d at 957 n.11; *Bedding, Curtain & Drapery Workers Union, Local 140* v. *NLRB,* 390 F.2d 495, 503 (2d Cir.), *cert. denied,* 392 U.S. 905 (1968); *National Maritime Union* v. *NLRB, supra,* 346 F.2d at 420. *Electrical Workers, Local 501* v. *NLRB* and *Hughes* v. *Superior Court* expressly support this conclusion.

In sum, section 8(b)(4)(ii)(B), as applied to prohibit the picketing herein, is constitutionally permitted.

CONCLUSION

For all of the foregoing reasons, we urge that the decision of the court of appeals be reversed, and the Board's order be enforced.

Respectfully submitted,

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